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80-1730

NO.

IN THE

Supreme Court of the United States

October Term, 1980

GILES M. LUGAR
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Plaintiff-Petitioner, Giles M. Lugar, brought suit in the United States District Court for the Western District of Virginia alleging a cause of action for deprivation of civil rights under 42 U.S.C. §1983. The deprivation complained of was prejudgment attachment of Plaintiff's business assets. Jurisdiction was alleged to lie under the provision of 28 U.S.C. §1343 and 28 U.S.C. §1331.

The trial court acting sua sponte dismissed on the ground that there was no state action involved sufficient to state a claim cognizible under 42 U.S.C. §1983.

The Court of Appeals disagreed with the trial court's opinion, but affirmed the dismissal on the theory that joint engagement with the state, sufficient to amount to a cause of action requires usurpation, or corruption of state power by the creditor or such a surrender of power that the independence of the official is lost.

The questions thereby arising are:

1. Whether the action of the United States Court of Appeals for the Fourth Circuit, in affirming the trial court, is in conflict

with the decisions of the Courts of Appeals of other circuits which have found explicitly, or by implication, that there is jurisdiction and a cause of action stated under the same or similar circumstances.

2. Whether the United States Court of Appeals for the Fourth Circuit, in affirming the trial court, has rendered a decision on a federal question which conflicts with applicable decisions of this Court.

3. Whether the holding of the United States Court of Appeals for the Fourth Circuit that official corruption or surrender is necessary

to constitute a cause of action raises an important issue of federal law which should be decided by this court.

The petitioner, Giles M. Lugar, the plaintiff in this proceeding respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 3, 1981.

OPINIONS BELOW

The opinion of the District Court for the Western District of Virginia is unreported and unpublished and appears as Appendix, A infra, pp. 32. The Opinion of the Court of Appeals is yet unreported but published, appears as Appendix B, infra, pp. 42.

JURISDICTION

The Order or Judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1981. See Appendix B, pp. 42, infra. This Petition for Certiorari was filed less than ninety (90) days from the aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment XIV to the UNITED STATES CONSTITUTION provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Amendment V to the UNITED STATES CONSTITUTION provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1331 (a) provides in pertinent part:

> The district courts shall have jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States . . .;

(2) :

(3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

Va. Code Ann. §8-519 (Now §8.01-533) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 375) states in pertinent part:

> If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefore on any one or more of the grounds stated in the following section . . . .

Va. Code Ann. §8-520 (Now §8.01-534) (Code of Va. Vol 2, 1957 Repl. Vol. pp 376-377) provides in pertinent part:

> It shall be sufficient grounds for an attachment that the principal defendant or one of the principal defendants:
>
> :
>
> (4) Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay or defraud his creditors.
>
> (5) Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors.
>
> :

Va. Code. Ann. §8-524 (Now §8.01-537)(Code of Va. 1976 Cum. Supp.) Vol. 2, 1957 Repl. Vol. p. 38 provides in pertinent part:

> Every attachment, except an attachment for rent, shall be commenced by a petition

filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by §8-522.

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.

If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a motion for judgment under Rule of Court 3:18(d) shall be sufficient. The petition shall also set forth the

existence of one or more of the grounds of attachment mentioned in §8-520, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of both defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some person cognizant of the facts stated therein.

Va. Code Ann. §8-526 (Now §8.01-540)(Code of Va., Vol 2, 1957 Repl. Vol. p. 382) States in pertinent part:

> Upon the filing of the petition mentioned in §8-524, the clerk or the justice of the peace before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8-524.1. . . . If the petitioner

> seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

Va. Code Ann. §8-527 (Now §8.01-541) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 382) states in pertinent part:

> Any attachment issued under this chapter may be directed to the sheriff, sergeant or constable of any county or city. Except when otherwise provided, it shall be returnable to a day of a term of the court not more than thirty days from its date of issurance nor less than 10 days from the date of service . . . .

Va. Code Ann. §8-533 (Now §8.01-546) (Code of Va., Vol. 2, 1957 Repl. Vol. p. 384), provides in pertinent part:

> . . . Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand . . . .
>
> Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for attachment, or state his grounds of defense thereto.

Va. Code Ann. §8-539 (Now §8.01-552)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 389) provides in pertinent part:

If the principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that fact, and the attachment shall stand dismissed ipso facto unless within ten days from the service of such notice the plaintiff or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment.

. . .

Va. Code Ann. §8-540 (Now §8.01-553)(Code of Va. Vol. 2, 1957, Repl. Vol. p. 389) provides in pertinent part:

> Any property levied on or seized as aforesaid, under any attachment, may be retained by or returned to the defendant or other person in whose possession it was on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the principal defendant may, by giving bond with condition to perform the judgment of the court, release from any attachment the whole of any estate attached.
>
> . . .

STATEMENT OF FACTS

On 1 April, 1977, Petitioner Lugar was the lessee-operator of

a truck stop located in Pittsylvania County, Commonwealth of Virginia.

On 31 March, 1977, the defendent Barbour prepared a Petition for Attachment directed to the Clerk of the Circuit Court of Pittsylvania County as provided in Va. Code Ann. §8-519. [1] This petition, Exhibit A to petitioners Complaint, alleged, in part, that Lugar was converting, assigning and disposing of his assets with intent to hinder or delay his creditors. No fraud or intent to defraud was alleged.

---

1. Title 8 of the Code of Virginia was revised, recodified, and reenacted as title 8.01 effective 1 October, 1978. References herein are to the statutes in force at the time of attachment.

The petition was filed with the clerk, as required by Va. Code Ann. §8-524. The clerk, as commanded by Va. Code Ann. §8-526, issued an attachment directed to the Sheriff of Pittsylvania County, Virginia. The sheriff levied upon Lugar's assets as required by law, Va. Code Ann. 8-533, freezing his assets and closing his business. Lugar filed an affidavit of substantial defense, Va. Code Ann. §8-539; in response to which the creditor posted bond. Va. Code Ann. §8-539.

The first hearing on the attachment petition was held on

19 April, 1977, and, at the creditors request a rehearing was held on or about 1 May, 1977, with a decision dissolving the levy handed down on 4 May, 1977.

The Court of Appeals found that the sheriff "levied upon certain of Lugar's property, effectively sequestering it though it was left in Lugar's possession." (App. B, pp. 48 and 49).

Prior to the levy there was no hearing or fact finding by a judicial officer, no notice to Lugar, no bond posted and no statement of more facts than conclusory allegations which parroted the statute.

After proceedings in the State Courts, Lugar brought this action in the United States District Court for the Western District of Virginia, alleging a cause of action under 42 U.S.C. §1983. Lugar stated as his facts supporting his Complaint that Edmondson's and Barbour's actions were maliciously inspired; the Edmondson and Barbour were joint participants with the state acting under Color of State law; that Edmondson and Barbour, acting with the state, had deprived him of property without due process and that he had been injured thereby.

The District Court dismissed the complaint on the authority of Flagg Bros., Inc. v. Brooks, 436 U.S. 149(1978). The District Court found that there was no state action apparent analogizing the attachment levy to the enforcement of a consensual lien.

Lugar appealed. The case was argued to a three-judge panel in November, 1979. The Court of Appeals, then acting sua sponte, set the matter for a rehearing en banc on January 7, 1980.

The Court of Appeals disagreed with the trial court that Flagg Bros., supra was dispositive.

However, it affirmed the dismissal of the Complaint. It characterized the issue as one of "private action 'under color of state law,' within the contemplation of §1983." Appendix B at 45 .

The Court of Appeals conducted a lengthy analysis. It concluded that since there was no allegation or evidence of "usurpation or corruption of official power" or "surrender of power [by a state official] so that the independence of the enforcing official has been compromised to a significant degree and the official powers have become in practical effect shared

by the two," that no cause of action was stated. App. B at 103-4. The Court characterized the attachment proceeding as submission by a litigant of "his interests along with those of his adversary to the neutral administration of the [State's] process by state officials having that responsibility.

ARGUMENT I

Review by this court is necessary as the holding below conflicts with the decisions of Courts of Appeals of other Circuits. These Courts have allowed relief on a cause of action involving private plaintiffs, where the wrong

alleged was a prejudgment attachment or garnishment. Johnson v. American Credit Co. of Georgia, 581 F.2d. 526(5th Cir. 1978); Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F.2d 125 (8th Cir 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973).

See also, Jonnett v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) where in the Court found prejudgment attachment statutes unconstitutional. Although this apparently involved diversity jurisdiction, the Court reached

the federal question on the statutes. The implication would be that the Court would recognize a cause of action.

The holding below would also conflict with the analysis and finding of jurisdiction in Diffenbach v. Attorney General of Vermont, 604 F.2d 187, 192-195 (2d Cir. 1979). There the Court of Appeals found jurisdiction based on the involvement of the state judicial process.

II

Review by this Court is necessary as the holding below conflicts with the decisions of this Court in Fuentes v. Shevin 407 U.S. 67 (1972) and Lynch v.

Household Finance Corp., 405 U.S. 538(1972). Both of these cases involve claims for relief against prejudgment garnishment or seizure of property under 42 U.S.C. §1983. Both involved action by state officials at the behest and for the benefit of creditors, without protection to the debtor. This court recognized a cause of action and awarded relief in each case.

III

Review by this court is necessary as the decision below raises an important question of federal law which has not been,

but should be, settled by this court. The decision of the Court of Appeals would establish a requirement that there be corrupt motives and acts by state officials or a surrender of their power to the private party. There is no previous authority for this proposition in the decisions of this Court or the Court of Appeals. The holding further characterizes the initiation of the attachment as submission of interests to a neutral administration of state powers. This not only conflicts with the decisions of this Court and the Courts of Appeals it establishes the

principal that a Court Clerk, acting in his ministerial capacity, is neutral.

The holding below would, by its new definitions, severly restrict the availability of federal relief to aggrieved plaintiffs unable to prove official malice and wrongdoing. The proper standard is an issue undecided by this Court.

The conflicts and issues raised in the above arguments are of continuing importance and should be resolved by this Court.

CONCLUSION

For the above reasons, Petitioner respectfully submits

that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

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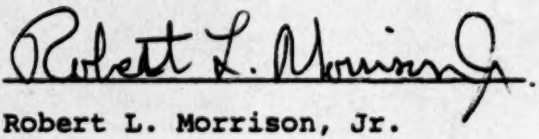
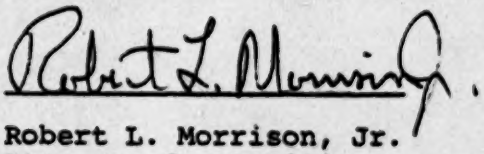
By: 

Robert L. Morrison, Jr.

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I am admitted to practice before the Supreme Court of the United States and that I have this the 6th day of April, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C., and have mailed the required copies of said petition for Writ of Certiorari to Jackson Kiser,YOUNG, KISER, HASKINS, MANN, GREGORY & YOUNG, LTD., 60 West Church Street,

Martinsville, VA, and H. Victor Milner, VANSANT, VINES & MILNER, Main Street, Chatham, VA.



Robert L. Morrison, Jr.
Attorney for Petitioner

GILES M. LUGAR Plaintiff	+	
v.	+	OPINION AND JUDGMENT
EDMONDSON OIL COMPANY, INC.	+	78-0020(D)
and	+	
RONALD L. BARBOUR Defendants	+	

Giles M. Lugar has brought suit against Edmondson Oil Company, Inc., and Ronald L. Barbour, the sole owner of Edmondson Oil Company, under 42 U.S.C. Sec. 1983. Lugar alleges jurisdiction under 28 U.S.C. Sec. 1331 and Sec. 1334.

The controversy stems from a petition for attachment which Barbour filed against Lugar. It appears to the court from the record that the

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COMPANY, INC.

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RONALD L. BARBOUR
Defendants

APPENDIX A

MEMORANDUM AND ORDER

---

clerk of the Pittsylvania County Circuit Court subsequently issued the attachment order and the sheriff levied and attached Lugar's property. The Circuit Court of Pittsylvania County, Virginia, later ordered that the attachment be dismissed. Subsequent to the filing of the Sec. 1983 action by Lugar, the defendants, Edmondson Oil Company and Barbour filed a motion to dismiss on the ground that this court should abstain from deciding this case because the plaintiff challenges the constitutionality of the Virginia statutory attachment procedures.

After review of the record, the court has determined that the complaint is patently defective on its face in that it fails to state a federal claim on which relief can be granted. The principle on which the court is constrained to make this interpretation has been recently restated by the United States Supreme Court in Flagg Brothers, Inc. v. Brooks, 46 U.S.L.W. 4438 (May 15, 1978).

In Flagg Brothers, the court held that the action by the warehouse company in threatening the respondent with sale of her belongings unless she paid her storage

account did not constitute state action. The actions by the private individuals in Flagg Brothers were even more extreme than the actions by the private defendats in this case, since here the private defendants merely filed a petition for attachment. It was rather the sheriff who carried out the proceedings similar to those conducted by private parties in Flagg Brothers. Since the actions of the private parties in Flagg Brothers did not constitute state action, the lesser actions by the private parties before this court therefore do not constitute state action.

It is significant that this plaintiff has not named any public officials as defendants. This aspect of the case before this court parallels the situation in Flagg Brothers. The Supreme Court noted in Flagg Brothers that its earlier decisions which delineated restrictions in the remedies available to creditors can be distinguished because they involved overt official involvement. See North Georgia Finishing, Inc. v. Di-Chem. Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972) Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

The court in Flagg Brothers indicated that in only a few categories of cases have the actions of private parties been attributed to the state. One such category is composed of powers reserved exclusively to states, including elections and the municipal functions of corporate towns. The actions by Edmondson Oil Company and Barbour do not come under either of these headings.

The majority opinion in Flagg Brothers additionally explained that the fact that the state had enacted the law under which the warehouse company took action did not make the company's actions attributable

to the state. Similarly, the fact that Virginia enacted the attachment statutes under which Barbour filed a petition for attachment does not render his actions public.

This court notes that, despite plaintiff's protests to the contrary in its Memorandum in Opposition to Motion to Dismiss, the complaint can only be read as challenging the constitutionality of Virginia's attachment statute. Although plaintiff claims that defendants have violated the statute, he makes no specific elaboration of what actions were irregular under the staute. In addition, plaintiff

argues that even if the attachment were declared valid, he would still have a constitutional claim. This in effect challenges the adequacy of the state statute to protect him from the alleged wrongful acts of the defendants.

If plaintiff nevertheless continues to maintain that he does not challenge the constitutionality of the Virginia statute, then this would serve as an additional basis for dismissal of his complaint. Even Judge Stevens' dissent in Flagg Brothers explains that if a plaintiff merely claims that the defendant deviated from the require-

ments of a state statute, then the plaintiff should present his claim to a state court rather than bring a Sec. 1983 suit.

Since no substantial federal claim exists, this court also dismisses plaintiff's third count which presents a claim only under state law. This court will not extend its pendent jurisdiction to cover this state claim.

Consequently the court on its own motion is constrained to conclude that the complaint, as currently constituted, fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12

(h) (2). Accordingly, the complaint must be and hereby is dismissed without prejudice and it is so ORDERED.

Each party is to bear his own costs of litigation. The clerk is directed to send certified copies of this opinion and order to the counsel of record.

ENTER: July 14, 1978.

Ted Dalton

United States
District Judge

* * *

PHILLIPS, Circuit Judge:

Giles M. Lugar appeals the dismissal of his 42 U.S.C. § 1983 action in which he had alleged that the defendants as private party debt claimants in a state court action had maliciously invoked against him state prejudgment attachment procedures which resulted in the seizure of his property under a levy that was later set aside in the state proceeding because not supported on the facts shown. Claiming that the seizure by levy - whether as authorized by the state attachment statute or as erroneously carried out by state officials[1] - had deprived him

IN THE

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RONALD L. BARBOUR

APPENDIX B

Appeal from the United States District Court for the Western District of Virginia, at Danville. Ted Dalton, Judge

Argued: January 7, 1980
Decided: January 3, 1981

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges, sitting en banc.

Robert L. Morrison, Jr. for Appellant
H. Victor Millner, Jr. and Jackson L. Kiser for Appellee.

[1]There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him. The confusion first arose when, opposing the §1983 defendants' motion that the district court abstain to allow state court interpretation of the statute, Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality, so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted both in the district court and on appeal to this court. The district judge remarked upon it in his memorandum order dismissing the action, and observed in passing - since it had no bearing upon his basis for decision - that whatever Lugar's protestations in opposing the motion to abstain, his continued reliance upon the Supreme Court's creditor remedy decisions beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), unmistakably involved a challenge to the

1 (cont'd)
statute itself. We completely agree with this assessment. See Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1325 (10th Cir. 1978).

As will appear, it has not been necessary in our disposition of the appeal to address the question whether the property seizure was constitutionally invalid on either ground. We therefore note this confusion only to observe that had the challenge been limited to a claim of unconstitutional application of the statute in the course of the state attachment proceeding, we would have had a clear alternative basis for affirmance of the dismissal. It is well settled that no cause of action lies under § 1983 to redress deprivations of procedural due process occurring during state court litigation between private parties. See, e.g., Girard v. 94th St. & Fifth Ave., Corp., 530 F2d 66 (2d Cir. 1976); Henry v. First Nat'l Bank of Clarsdale, 444 F.2d 1300 (5th Cir. 1971); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948). But see, Kermit Constr. Corp. v. Banco Credito y Ahorro

of property without due process of law, he sought monetary relief against the state debt claimants.

The issue presented is whether the debt claimants' conduct as alleged constituted private action "under color of state law" within contemplation of §1983. The district court held, relying essentially upon

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1 (cont'd)
Ponceno, 547 F.2d 1 (1st Cir. 1976). Because, with the district court, we construe Lugar's claim to include a constitutional challenge to the statute itself, the lack of merit in the challenge to the statute's procedural application would not be dispositive of his claim. We, of course, express no view upon the constitutionality of the statute in view of our disposition upon other grounds.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), that the complaint did not allege a deprivation of property by "state action," and accordingly dismissed the action for failure of the complaint to allege a claim cognizable under §1983. Though we do not find Flagg Brothers dispositive as did the district court, we affirm dismissal of the action on the basis that the defendants' conduct as alleged did not constitute private action under color of state law.

I

In the spring of 1977, Lugar was operating a truck stop

in Pittsylvania County, Virginia, and was then indebted to the defendant Edmondson Oil Co., Inc. (Edmondson). Edmondson commenced a civil action to recover on the debt in a Virginia state court, and ancillary to that action petitioned pursuant to state law [2] for pre-judgment attachment of certain of Lugar's property to prevent its dissipation as a judgment satisfaction source. The petition, as verified under oath by the defendant

---

2. The attachment procedure invoked was that now provided by Va. Code §§ 8.01-533 et seq. The ensuing proceedings as summarized in this opinion, were all carried out in conformity with the prescribed procedure.

Ronald L. Barbour, Edmonson's president and sole stockholder, alleged in conclusory terms a belief that Lugar was disposing of or might dispose of his property in order to defeat his creditors and prayed that certain identified property be attached to prevent his doing so. Acting upon the ex parte petition, a clerk of the state court in which the principal action was pending issued a writ of attachment, which was then executed in due course by the county sheriff, who levied upon certain of Lugar's property, effectively sequestering it though

it was left in Lugar's possession. No preattachment bond was required by state law as a condition to securing the attachment, and none was provided, but Edmondson did later post a bond as required by law after Lugar filed an affidavit of substantial defense some days after the levy. Pursuant to statute, a hearing on the propriety of the attachment and levy was later conducted by a state trial judge who then, some thirty-four days after the levy, ordered the attachment dismissed on the basis that Edmondson had failed to carry the burden imposed by state law to

establish by evidence the grounds for attachment alleged in the petition. At this point the petition for attachment was retained on the state court docket and the principal action proceeded to the entry of judgment on the debt in favor of Edmondson. Some of Lugar's property was then sold in execution of the judgment.

Lugar then brought this §1983 action against Edmondson and Barbour, alleging in greater detail the essential facts above summarized as to the course of the state court proceedings; that Edmondson's and Barbour's actions were maliciously

inspired; that the attachment of his property was by virtue of official state action in which Edmondson and Barbour had willingly participated; that this resulted in a deprivation of his property without due process of law; and that in consequence he sustained specifically identified financial loss for which he was entitled to compensatory and punitive damages. [3] As earlier indicated, the district court concluded that the complaint failed

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3. The complaint alleged two generally comparable federal claims under 42 U.S.C. §1983, and a pendent state claim for malicious prosecution.

to state a claim upon which relief could be granted under §1983, essentially on the basis that Flagg Brothers compelled the conclusion that the private actions of the defendants as alleged did not constitute state action.[4] This appeal followed.

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4. The dismissal was entered sua sponte, without prejudice, citing Fed.R.Civ.P. 12(h) (2), upon consideration of the defendants' motion to abstain and the plaintiff's response. Though the plaintiff unsuccessfully sought reconsideration of this order in the district court because of the irregularity of the sua sponte dismissal, he has not assigned this as error on appeal, and as appellant, he has freely joined issue of the merits of the dismissal for failure to state a claim for relief.

II

Against this background, we begin analysis by restating, in slightly recast form, the dispositive issue as we perceive it. It is whether the mere institution by a private litigant[5] of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by

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5. We will refer throughout to the two §1983 defendants, Edmondson Oil Company and its President Barbour, as state court litigants, though only the corporation was a nominal plaintiff. Lugar's claim against Barbour treats him as the corporate defendant's alter ego.

that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of §1983.

Because this formulation of the issue both anticipates and reflects major points in our analysis, we emphasize those of its elements most critical to that analysis. First, it deliberately focuses inquiry upon whether the specific conduct directly chargeable to the §1983 defendants was taken under color of state law, rather than

upon whether the ultimate deprivation of right charged can be attributed to state action. Next, it emphasizes that the conduct directly chargeable to the §1983 defendants is narrowly that of invoking, as private litigants, state judicial proceedings for the adjudication of a private controversy, and includes no earlier or later involvement of the §1983 defendants with state officials other than as private litigants in those proceedings. Finally it emphasizes that the ordering principle being sought is one generally applicable to the non-

collusive invocation by private litigants of any state judicial proceeding, and is not limited to the particular type here in issue - ancillary proceedings for seizure of property for the benefit of creditors.

As suggested in this formulation and discussion of the dispositive issue, we think that its resolution requires, in the first place, careful attention to and refinement of a fundamental congruent, concepts of state action and action under color of state law in §1983 doctrine. To say why requires a brief prelim-

inary alalysis of the way in which evolving §1983 doctrine may have tended to blur or to finesse the distinction, followed by a discussion of the importance of the distinction in making proper application of §1983 doctrine to private defendants in the particular litigation context of this case.

It has become a commonplace that in the typical §1983 case involving a claim of deprivation of a constitutionally secured right, the state action requirement necessitated by the Fourtheenth Amendment's undergirding,[6] and the

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6. Though the Amendment nowhere uses the term state action, its basic

under color of state law requirement necessitated by the statutory language[7] ordinarily come to the same thing.[8] Nevertheless there

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6. (cond't)
commands that "no State shall make or enforce any law . . .nor . . . deprive . . . nor deny [rights]," has long since been transmuted in common usage into this shorthand form, which remains firmly fixed in the doctrinal lexicon because of the inescapable fact that the prohibition is addressed only to the "State," even if it be conceded that the prohibited conduct of "making, enforcing, depriving, or denying" might well admit the notion of "inaction" as well as of "action." See generally Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 S. Ct. Rev. 221, 228-32.

7. Again, the term is a shorthand formulation in which

has been occasional recognition that this is not always so - that the two are separate, not necessarily congruent, but cumulative predicate elements of a prima

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7. (cont'd)
"law" does service for a more complex definition of the sources of state authority in 42 U.S.C. §1983. The reference there is to a "person who, under color of any statute, ordinance, regulation, custom or usage of any State. . . ."

8. The cases are legion reciting that the two terms mean the same thing. See, e.g., United States v. Price, 383 U.S. 787, 794 n.7 (1966); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642 n.6 (4th Cir. 1975); Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir. 1974); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739, 741 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 329 (9th Cir. 1973).

facie §1983 claim.[9] The reason for all this emerges upon consideration of the way in which the two requirements are confronted in the three basic patterns into which §1983 litigation has tended to fall.[10]

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9. See, e.g., Flagg Brothers, 436 U.S. at 156 (majority); id. at 177 n.14 (Stevens, J., dissenting); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1969) (majority); id. at 189-90, 210-12 (Brennan, J., concurring and dissenting); Deffenbach v. Attorney Gen. of Vt., 604 F.2d 187, 193 n. 10 (2d Cir. 1979); Lavoie v. Bigwood, 457 F.2d 7, 15 (1st Cir. 1972).

10. The state action requirement is encountered, of course, in various contexts other than §1983 litigation. Closely related to the §1983 litigation context are those

10 (cont'd)
cases wherein a state litigant directly challenges the constitutionality under the Fourteenth Amendment of a state statute in order to be relieved of its legal effect. In most such cases - and Sniadach, 395 U.S. 337, and its progeny are most apposite to the §1983 litigation before us - the existence of state action is manifest in the very fact that state officials are directly charged with and obviously engaged in enforcement of the statute, see Flag Brothers, 436 U.S. at 157, or, as some would see it, in the more fundamental fact that the statute has been enacted by the state legislature, see id. at 172-76 (Stevens, J., dissenting). In consequence, in these cases, state action is ordinarily simply assumed without discussion and because there is no under color of state law requirement even potentially in play, these cases have provided no occasion for developing the distinction.

In the first pattern - the so called "official act" case which makes up the bulk of §1983 litigation - the specific conduct alleged to have deprived of secured right is indubitably only official action,[11] i.e., that alone of state officials acting officially in legislative, e.g., Owen v City

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10 (cont'd)
Even more closely related to the §1983 action are those wherein companion civil rights statutes such as 18 U.S.C. § 242 are invoked to prosecute for violations of constitutionally secured rights. In such cases dual state action and under color of state law requirements comparable to those grounded in §1983 do exist, but the tendency has been to consider them by reference to §1983 decisions. See,

of Independence, ___ U.S. ___, 48 U.S.L.W. 4389 (Apr. 16, 1980) (No. 78-1779); judicial, e.g., Stump v. Sparkman, 435 U.S. 349 (1978); or executive enforcement, e.g., Monroe v. Pape, 365 U.S. 167 (1961) (police officers) roles. In such cases the

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10 (cont'd)
e.g., Price, 383 U.S. at 794 n.7. Consequently, they also have not provided any separate sources for refining the distinction.

11 Of course there may be dispute on the preliminary question whether particular §1983 defendants should be deemed agents of the state so that their actions are indubitably state action. See, e.g., Hall v. Quillen, ___ F.2d ___, No. 78-1412 (4th Cir. Oct. 17, 1980) (conduct of court-appointed physician and counsel in civil commitment proceeding not state action).

only possible state action is that of the state officials charged, and the only possibly disputable question[12] is whether those officials were acting under color of state law in doing the act charged. Where dispute has arisen on the latter issue, its resolution has

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12 That is, disputable in respect of the issues whether state action is involved and whether the defendants acted under color of state law. Of course there may be other disputable questions going to whether the right assertedly violated is one entitled by content to constitutional protection, e.g., Paul v. Davis, 424 U.S. 693 (1976).

necessarily resolved any further question whether the resulting deprivation of right was by virtue of state action. See Flagg Brothers, 436 U.S. at 157 & n.5. Because in most official act cases decided since Monroe v. Pape there is no disputing that the specific conduct charged to officials was done "under color," there has not been any great need arising from these cases to refine the distinction. In these cases, that is to say, the state action question is subsumed in the under color of question, and the latter is seldom raised.

In the second pattern, private actors alone are alleged to have engaged, at what could be called the operational or enforcement level, in conduct that deprived of a secured right. At this level, no state official is involved. If state action is found to exist it is because the private action at the level where deprivation actually occurs is "attributable to the state" by virtue of decisions taken, or policy established, or legislation enacted at higher levels. "Attribution" of this kind of private action to the state may be tested under any of

several theories: practical compulsion by the state, e.g., Adickes, 398 U.S. at 170-71 (compulsion of custom; under "substantive count"); a "symbiotic relationship" between private actor and the state, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (insufficient for state action); or delegation or abdiction to the private actor of an exclusive sovereign function, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action; function not exclusively sovereign); Flagg Brothers, 436 U.S. 149 (same).

This pattern also does not force

separate consideration of the two predicates of state action and action under color. The reason is plain. Addressing the attribution issue first - as is appropriate - in effect converts this pattern conceptually into an official-act case one the threshold question is resolved. If state action is found by attribution, the private actor has been found in effect a de facto agent of the state, and the under color of question has been merged in the state action inquiry just as it is in official-act cases. See, e.g., Adickes, 398 U.S. at 170-71

(private action attributed to state because of practical compulsion; action under color of state law assumed without discussion). By like token, if state action is not found by attribution, there is no need to address the under color of state law requirement because the two are cumulative and the claim has already failed. See, e.g., Flagg Brothers, 436 U.S. 149, Moose Lodge, 407 U.S. 163; Jackson, 419 U.S. 345.

Only the third pattern - into which the instant case falls - may make necessary separate consideration of the two requirements. It

does so whenever state action is first found to exist. In this pattern the conduct of a private actor defendant is alleged to have combined with the acts of state officials at the enforcement or operational level to cause deprivation of a secured right. In this situation, as observed by the Supreme Court, the "involvement of a state official . . . provides the state action . . .,"[13] Adickes, 398 U.S. at 152 (conspiracy count); but it does not resolve not even touch upon the further question whether the private defendant's contributing conduct was taken

under color of state law, see id. That remains for separate resolution, and to that problem we now turn, since as indicated, we consider it the dispositive issue in this case.

As a moment's reflection will show, in this pattern the state action requirement can differ from the under color of state law requirement only if the two are

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13 It should be observed that, as in Adickes itself, the official involvement need not be that of a named § 1983 defendant. In Adickes there was only a single defendant, the private business entity. The state official with whom the conspiracy was alleged was not joined as a defendant.

See also note 16 infra.

referable to different conduct. This is the key to the distinction that is critical to correct application of §1983 to this particular fact pattern. We think that the different objects of reference are readily identified by considering the twin, separate concerns reflected in these two predicate elements of the §1983 cause of action.

Reflecting the ultimate concern that "it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack," Friendly, The Dartmouth College

Case and the Public-Private Penumbra, 12 Tex. Q 17 (No.2 1969 Supp.) the state action requirement is properly referred to the totality of conduct - public and private - that is alleged to have combined in causing the deprivation of right. If state involvement, whether at the enforcement or more remote levels, is a significant contributing factor in this totality, the state action requirement can be found met.

Reflecting, on the other hand, the unmistakable concern expressed in 42 U.S.C. § 1983 to give added protection to federally secured rights by providing a private

tort-like cause of action against particular violators, the under color of state law requirement is properly referred to the specific conduct directly charged to particular defendants. Analyzed in this way, it is plain that to find state action "provided" in this pattern by the "involvement" of state officials in the totality of conduct that resulted in a deprivation of secured right does not decide, nor even address, the separate question whether the private conduct of a particular defendant which was also involved to come extent was under color of state law.[14]

14 This analysis emphasizes the clear relationship between this particular pattern of §1983 litigation and that larger pattern of general tort litigation in which a claimant has suffered injury by reason of the separate actions of more than one person which allegedly have concurred to produce an indivisible injury. See generally Restatement (Second) of Torts, §§875-882 (1977). Viewing this § 1983 pattern in that larger pattern confirms the validity of the separate reference point analysis. In that general pattern, as here, a claimant is under no compulsion to join all potentially liable defendants in a single action; may establish joint and several liability for indivisible injury against all defendants whose conduct can be shown to have concurred in causing the ultimate injury; but is subject to all independent as well as common defenses available to any defendant sued. Id. Set in this more general context, the state action requirement, concerned as it is with the nature of the protected interest and the injury to that interest, is properly referred to the totality of the

12 (cont'd)
conduct leading to the indivisible injury; whereas the under color of state law requirement, concerned as it is with a special attribute of the specific conduct charged to particular tortfeasor defendants, is properly referred to that specific conduct. So viewed, the lack of an under color of state law quality in a §1983 defendant's conduct is of a piece with other independent grounds upon which liability may be escaped by such a defendant even though state action clearly exist in respect of the ultimate deprivation of right charged. See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) (official immunity); Hall v. Tawney, 621 F.2d 607, 615 (4th Cir. 1980) (only indirect involvement; no vicarious liability).

This analysis may also serve, incidentally, to suggest the rightful limits of an "actor-focussed" approach to state action problems in §1983 litigation, an object of recurring scholarly criticism. See, generally L. Tribe, American Constitutional Law 1147-74 (1978).

This then leads to the question of the appropriate test for determining in this particular pattern of litigation whether private actor conduct has that quality. On this question our most authoritative guidance from the Supreme Court is found in Adickes, where the issue was directly confronted. There, in considering a claim that the private party defendant had conspired with state officials to deprive the claimant of constitutional rights by preventing interracial association, [15] the Court posited two

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15 The Adickes claim was based upon two counts, one of

elements. First, at the very least, the private actor defendant must have acted "with the knowledge of and pursuant to" the state law in question, 398 U.S. at 161 n.23. Next, and more critically, he must

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15 (cont'd)
which was the conspiracy count. The other count alleged a direct deprivation of the right by the private defendant's conduct in enforcing state racial segregation custom. This latter count was analyzed by inquiring whether the private conduct, considered alone, was attributable to the state because of the practical compulaion of state custom. In line with our analysis here, once state action by attribution was found in Adickes, the under color of state law requirement as to this count was apparently assumed without discussion. 398 U.S. at 169-71.

have been "jointly engaged with state officials," or, put alternatively, "a willful participant in joint activity with the State or its agents." Id. at 152 (quoting Price, 383 U.S. at 794 n.7) (emphases added).

Taking this as the appropriate analytical framework for the litigation pattern into which the instant case falls, and its separate tests of state action and action under color of state law as the proper ones for application to that pattern, we turn now to their application to the claim sought to be stated by Lugar.

III

A convenient beginning point for the concluding, application stage of our analysis is to consider the Supreme Court's decision in Flagg Brothers which, as indicated, the district court felt was directly dispositive of this case. For reasons that will appear, we do not agree with this view of Flagg Brothers' ultimate implications, though its general importance to decision here is clear. In the course of showing why, we think that the validity of the analytical approach we adopt will be made more plain and that its application to

the facts alleged in this case will also be shown completely compatible with the application of Flagg Brothers' test of state action to the racts in that case.

Flagg Brothers addressed the question whether a private warehouseman's sale of stored goods as permitted under a state statute would expose the warehouseman to possible §1983 liability to the property owner for deprivation of property without due process of law. The statute, New York's version of U.C.C. §7-210, gave the warehouseman a lien for unpaid storage charges and allowed him,

upon ex parte notice to the owner, to sell the property at private sale in execution of the lien. Neither levy nor seizure by state officials nor judicial proceedings of any sort either before or after the sale were required.

After positing the dual requirements that a §1983 defendant's conduct must be both taken under color of state law and attributable to state action, 436 U.S. at 156, the Flagg Brothers Court found the claim deficient on the second: state action had not been shown. The possibility of state action was analyzed under two basic theories

earlier noted in this opinion: (1) that the warehouseman's private conduct might be attributed to the state because it was authorized by statute, or because it involved the exercise of a function lying within the exclusive prerogative of the state; and (2) that state action might be provided, as in Adickes, by "overt official involvement" at the operational level. Both were rejected by the Court. The function exercised - self-help sale in execution of a lien - was not an exclusive function of state sovereignty, and the mere authorization of the procedure by state

legislative enactment did not itself supply the state action element. Id. at 157-66. Neither could state action be found on the basis that state officials were engaged with the private defendant in directly depriving the §1983 claimant of property. On the contrary, said the Court, the §1983 claimants had "named no public officials as defendants" in the §1983 action [16] and there was no "overt

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16 With all deference, we suggest that this particular point is properly treated as dictum in view of the clear implication from

Official involvement" in the challenged taking of the property by sale. Id. at 157. This latter point sufficed to distinguish the case, said the Court, from those

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16 (cont'd)
cases such as Adickes (see note 13 supra), Moose Lodge, and Jackson - where no significance was attached to the non-joinder of puboic officials - that this factor has no controlling relevance to the state action issue. The critical point in Flagg Brothers is that there was no "overt official involvement" in the ultimate deprivation charged, not that state officials who might have been joined as defendants were not. But see Flagg Brothers, 436 U.S. at 173-74 (Stevens, J., dissenting).

creditor remedy cases such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach, 395 U.S. 337, wherein state action was manifest in the direct enforcement of the creditor remedies by state officials. Having found the state action element wanting in the claimant's statement of claim, the Court was not required to address the separate under color of state law element.

As noted, the district court in this case thought Flagg Brothers dispositive against Lugar's §1983

claim. As the district court saw it, if the warehouseman's self-help conduct in Flagg Brothers could not be attributed to the state, then that of the debt claimants in the instant case clearly could not be. The New York warehouseman's action was "even more extreme" than the "lesser actions" by the private debt claimants who in the Virginia proceeding had merely filed a petition for attachment." Further, said the district court, Flagg Brothers' rejection of the contention that New York's enactment of the warehouseman's self-help statute itself constituted "autho-

rizing" state action was dispositive against any similar contention with respect to Virginia's enactment of the statute invoked by the §1983 defendants here.[17] Finally, to the district court it was also "significant that [Lugar] had not named any public officials as defendants," a factor also noted

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17 It might conceivably be contended that in cases of this type the state action and under color of state law requirements are properly referred to the state laws providing general access to the courts rather than to the state law authorizing the particular judicial procedure invoked by the §1983 defendant. This possibility has been expressly rejected. See Henry, 444 F.2d 1300. We agree with the rejection.

by the Flagg Brothers court as militating against a finding of state action. [18] Lugar V. Edmondson Oil Co., No. 78-0020(D) (W.D. Va. July 14, 1978).

We agree with the district court's perception of Flagg Brothers' significance for the instant case so far as it concerns finding state action not present under an authorized-by-state-law of exclusive-state-function theory of attribution. If those theories would not support a state action holding for the private warehouseman's self-help conduct in Flagg

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18 See note 16 supra.

Brothers, they would not support it for the "lesser" conduct of the defendants who in the instant case had simply instituted state judicial procedures which were then conducted under control and supervision of state officials.[19]

The district court failed, however, to take into account the basis upon which the Flagg Brothers Court rejected the alternative theory of state action, i.e., involvement of official conduct

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19 Cf. Flagg Brothers, 436 U.S. at 170-73 (Stevens, J., dissenting: state action supportable on either theory, particularly exclusive-state-function).

in the actual deprivation of right charged - the taking of the §1983 claimant's property.[20] As to that, the Flagg Brothers Court made a critical distinction between the facts before it and those presented in cases of the type before us. Under the New York self-help procedure, as authorized, there was no "overt" official involvement" in the challenged taking, while under the judicial creditor remedy

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20 The district court noted the distinction made on this point by the Flagg Brothers Court without comment beyond reference to the fact that, as in Flagg Brothers, no official was joined as defendant in the instant case.

procedures challenged in the Sniadach line of cases, "overt official involvement" in the taking of property was palpable. As the Flagg Brothers Court flatly put it, "[t]his total absence of overt official involvement plainly distinguises this case from earlier decisions imposing procedural restriction on creditors' remedies such as . . . Sniadach . . . ." 436 U.S. at 157.

The instant case obviously cannot be similarly distinguised on this theory of state action from those earlier decisions

involving judicial creditor remedies. If the challenged takings in those cases sufficiently involved state action, then so must the challenged taking through the overt involvement of the state officials - clerk of court and sheriff[21] - in the Virginia attachment proceedings here in question.

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21 Justice Stevens, dissenting in Flagg Brothers, disagreed with the majority's perception that it was the involvement of comparable state officials in conducting and enforcing the creditors' remedies in the Sniadach line of cases that provided the state action requisite for constitutional attack. He suggested that this sort of official involvement was rightly viewed as that of "minor governmental functionaries" acting ministerially, a type of official-

To hold as we do, however, that in this case - unlike Flagg Brothers, but like Sniadach and its progeny - there is state action in the ultimate taking of property charged as a deprivation of constitutionally secured right, does not address the question whether the specific action charged to the

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21 (cont'd)
act which has not, in his view, been thought to constitute state action for §1983 purposes. 436 U.S. at 173-74. See also Torres, 588 F.2d at 1327 (mere reading of restraining order by deputy sheriff not state action.). We are, of course, bound on this by the contrary view clearly expressed in majority opinion in Flagg Brothers.

private defendants as a contributing cause of that deprivation was taken under color of state law. As previously noted, that separate question was not reached in Flagg nor was it even potentially in issue in the Sniadach line of cases.[22]

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22 In Fuentes, 407 U.S. 67, the lone §1983 case in the line, the question might theoretically have been presented as one distinct from the state action question, in line with our analysis of §1983 litigation patterns. In the event, however, it was not presented because of the way the litigation ran its course. In the district court, the §1983 claimants had joined as defendants both the private person who as creditor had invoked the challenged creditor remedy and the state officials charged with enforcement, but sought against them only injunctive and declaratory relief. 317 F. Supp. 954

Within the analytical framework earlier established, this question is properly referred only to the specific conduct chargeable to these defendants - their invocation of and participation as litigants in the judicial proceedings which resulted in the challenged seizure of Lugar's property. As suggested, this question is properly decided by applying

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22 (cont'd)
(S.D. Fla. 1970) (three-judge court). Probably because in this posture the private party defendant was merely a nominal party to the action for injunctive relief against future enforement of state procedures, the question was simply moot.

the test of private action laid down in Adickes: whether the private actors by this conduct can be said to have engaged or participated jointly with those state officials whose overt involvement supplied the state action element of Lugar's §1983 claim.

Adickes did not further define the concept of "joint participation," but some examples have emerged from the relatively few cases confronting the issue. Adickes itself found it present on the facts of that case in a conspiratorial undertaking between private property owner and state law enforcement

officials to enforce state segregation law or custom against a §1983 claimant. 398 U.S. at 153-57.

Another example of "conspiratorial" conduct between private person and state officials held sufficient to expose the private actor to §1983 liability is provided in Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979). There the §1983 plaintiff alleged that officers of a bank to whom the plaintiff was indebted arranged with a police officer to have the plaintiff arrested for an unrelated misdemeanor and held in custody until a bank officer could arrive to

to pressure her to pay her bank debt. The Tenth Circuit held these allegations of joint participation of private party with state officials sufficient to state a §1983 claim against the former.

A final example - and the most instructive and compelling for our purposes - has recently been provided by the Supreme Court's decision in Dennis v. Sparks, ___U.S. ___ 49 U.S.L.W. 4001 (Nov. 17, 1980). Dennis affirmed the Firth Circuit's en banc decision, 604 F.2d 976 (1979), holding that (1) under Adickes, private state court litigants who by conspiracy with a state judge had induced the latter

to issue an injunction which deprived their adversary of property had thereby acted "under color of state law" for §1983 purposes, and (2) were not entitled derivatively to the absolute immunity defense available to their judicial officer co-conspirator. Reviewing the decision to resolve a circuit conflict on the derivative immunity issue, the Court observed preliminarily that the court of appeals had "correctly understood our cases," citing Adickes, in holding that the §1983 private defendants had acted under color of state law by virtue of their join engagement with state officials in the

challenged action. 49 U.S.L.W. at 4002. By way of contrast, the Court then noted, in a dictum of special significance to our analysis, that "[o]f course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or joint actor with the judge."[23]

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23 The dissent would apparently dismiss the significance of this dictum by finding in ancillary creditor remedy proceedings of the type here involved a special quality not possessed by the type of state judicial proceedings involved in Dennis. With all respect, we think that nothing in the apposite authorities supports such a view. As indicated earlier in this opinion, the Supreme Court creditor remedy

Whatever these authorities may imply by way of general principle

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23 (cont'd)
cases have simply not presented the under color of state law issue. See, text at note 22 supra. Furthermore, as earlier observed, the Flagg Brothers Court's ascription of a special quality to those cases was in respect of the existence of state action through "overt official involvement" at the enforcement level in contrast to the private self-help remedy involved in Flagg Brothers. Flagg Brothers recognized in them so special quality in respect of the under color of state law requirement. Finally, it should be noted that the judicial injuction in Dennis and the judicial attachment in the instant case came in the end to the same thing for §1983 purposes: an alleged unconstitutional deprivation of property. See, Torres, 588 F.2d at 1325 (similarity between interlocutory injunctive and sequestration remedies noted). Certainly Dennis itself implied no such distinction.

for the infinite variety of situations involving related private and official conduct that are possible in §1983 litigation, we think they suffice to supply a principle for resolving the question as we confront it. In the setting we consider, "joint engagement or participation" of private actor with state official implies such a usurpation or corruption of official power by the former or surrender ofpower by the latter that the independence of the enforcing official has been compromised to a significant degree and the official powers have become

in practical effect shared by the two. Judged by this test it is plain that merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process.[24]

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24 The legal deficiency in the under color of state law element in Lugar's statement of claim is not overcome by his allegation that the defendants' institution and prosecution of the state proceeding was

The private initiating act, and the official enforcement acts are in no realistic sense joint but are instead discontinuous and independent. In this context the "essential dichotomy," Jackson, 419 U.S. at 349, between private and public acts seems to us precisely defined at the point where a private

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24 (cont'd)
malicious. Hoever motivated, the critical point is that the private conduct was independent of, not joint with, the ensuing official conduct of the proceeding. Motive might have some relevance in establishing a qualified immunity defense based upon good faith; but that, of course, is not before us in assessing the sufficiency of the statement of claim. See Gomez v. Toledo, ___ U.S. ___, 48 U.S.L.W. 4600 (1980). See also District 28 v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979).

litigant, having invoked the state's process, thereupon submits his interests along with those of his adversary to the neutral administration of the process by state officials having that responsibility.

Accordingly, we hold that a complaint alleging only this conduct fails to allege that the defendants acted under color of state law.[25] On this basis, the action was properly dismissed for failure to state a claim cognizable under §1983.

AFFIRMED.

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25 This Circuit has twice before considered the general question we decide here - whether the mere

25 (cont'd)
invocation by a private litigant of state judicial proceedings may expose that litigant to liability under §1983 for any deprivation of federally secured rights that result. In each of those earlier cases, Wellmore, 609 F2d 1083, and Wilkins v. Rogers, 581 F2d 399 (4th Cir. 1978), a panel of this court found no cognizable §1983 claim stated against the private state court litigant. In Wilkins, the §1983 defendant had sued his wife in state court to resolve a title dispute. In Wellmore, the §1983 defendants had sued for and obtained state court injunctions atainst picketing by the §1983 plaintiffs.

While we consider those earlier decisions sound in result, and our decision here completely consistent with them, we have not thought it possible to rely solely upon them as controlling precedent for the result we reach here. In order to put the three decisions in perspective, we think it important to say why.

25 (cont'd)

In Wilkins, as the Wellmore panel noted, the court simply stated, without analysis, that the state court litigant had "not acted with the requisite degree of state action . . ."581 F.2d at 405. No extended analysis was warranted because of the clear lack of any merit to the claim, most obviously because it alleged nothing more than a deprivation of procedural due process in the course of private party litigation in a state court. See note 1 supra.

In Wellmore, a more extended analysis was undertaken, but in its course the court explicitly treated the state action and under color of state law questions as "equivalent," 609 F.2d at 1085 & n.2, and in consequence did not analyze them separately as we have found it necessary to do her. The necessity we have faced was that created by the Flagg Brothers Court's clear implication that a taking of property under state enforced creditor remedies of the Sniadach type does involve state action. That was a necessity that the Wellmore panel thought

25 (cont'd)
not upon it, for it expressly noted that such judicial proceedings might create a different state action problem. 609 F.2d at 1087. Reserving the question whether, under the Flagg Brothers analysis of "overt official involvement" in judicial proceedings, the type of proceeding has any critical bearing upon the state action issue in §1983 claims against the private litigant who instituted them, we observe that both the Wilkins and Wellmore decisions could readily be rested upon the under color of state law analysis we have applied to reach decision in the instant case without reaching any separate state action issue.

Also supporting the result we reach, though upon a variety of rationales, see Louisville Area Inter-faith Comm. v. Nottingham Liquors, Ltd., 542 F.2d 652 (6th Cir. 1976); Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975); Stevens v. Frick, 372 F.2d. 378 (2d Cir. 1967).

RUSSELL, Circuit Judge, concurs in the result.

JUDGE BUTZNER, with whom Judge Winter joins, dissenting:

I cannot concur in the court's restrictive interpretation of 42 U.S.C. §1983.[1] Sound precedent persuades me that a creditor acts under color of law when he uni-

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1. 42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

laterally invokes an attachment statute[2] and causes a sheriff to levy on his debtor's goods before a judicial officer has determined whether the facts justify pre-judgment seizure.

In Gomez v. Toledo, 100 S. Ct. 1920, 1923 (1980), the Court restated the elements of a cause of action under §1983:

> By the plain terms of §1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

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2. Va. Code §§8.01.533-576 (1977).

The debtor made both of the required allegations. This appeal, however, is not concerned with the first element. At this stage of the proceedings, the consitutionality of the attachment statute and the creditor's good faith reliance on it are not issues. Good faith is an affirmative defense. Gomez, 100 S. Ct. at 1924. Moreover, the clerk of court and the sheriff are not indispensible parties. Adickes v. Kress & Co., 398 U.S. 144, 152 (1970).

The sole issue involves the second element specified in Gomez. In the context of this case, it is

whether the creditor acted under color of state law within the meaning attributed to this concept in §1983.

Dennis v. Sparks, 49 U.S.L.W. 4001, 4002 (U.S. Nov. 17, 1980), reiterates the Court's explanation of acting under color of law:

> [T]o act 'under color of' state law for §1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions.

Dennis reaffirmed the interpretation of §1983 that the Court expounded in

Adickes, supra 398 U.S. at 152, but Dennis adds this note of caution: "Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." 49 U.S.L.W. 4002. We held as much in District 28 UMW v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979), where resort to a court for a temporary injunction did not establish liability under §1983. But in Wellmore, 609 F.2d at 1086, we carefully distinguished attachment cases, such as Fuentes v. Shevin, 407 U.S. 67 (1972),

where, as here, a creditor unilaterally invoked a statute that did not require notice to the debtor or resort to a court for a hearing before the sheriff seized the debtor's property.

Two Supreme Court cases, which are at opposite poles with respect to creditors' conduct in the context of §1983, explain the principles that govern this appeal. Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978), held that a warehouseman's proposed sale of goods as permitted by state law was not state action within the meaning of the fourteenth amendment. There must be something

more to attribute the warehouseman's act to the state, and at 436 U.S. 157 the Court explained what was lacking:

> This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restructions on creditors' remedies such as . . . Fuentes v. Shevin, 407 U.S. 67 (1972) . . . .

Since the sale could be conducted without the assistance of any state officials, no claim could be made in Flagg that the warehouseman was acting under color of law by willfully participating with the state's agents.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court found that both elements of a cause of action

under §1983 were satisfied. From the standpoint of the sole issue now before us--whether the creditor acted under color of law--the factual backgrounds of Fuentes and this case are in all material respects similar.[3]

Both Fuentes and this case arose from creditors' ex parte applications to clerks of courts for prejudgment writs directing sheriffs to attach the debtors'

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3. This is not to say that the creditor in this case is liable. As previously mentioned, liability depends on a declaration that the Virginia statute is unconstitutional and on the resolution of the creditor's good faith defense. Neither of these issues has been addressed, and I express no opinion about them.

property in accordance with state laws. In each case, apart from ascertaining the creditor's facial compliance with the statute, the officials acted in their ministerial capacities. Unlike a judge, they made no factual findings or legal conclusions about the merits of the creditor's claim or even about his justification for seeking immediate seizure. They acted at the behest of and in behalf of the creditor. Obedient to the creditor's petition and the attachment statute, the clerk issued the writ, and the sheriff attached the debtor's goods. The creditor willfully participated

with the officers in this joint undertaking for it was he alone who induced them to act in accordance with the law that he invoked.

Fuentes emphasizes that a creditor under such circumstances does not play a peripheral role. His participation with the officers is the heart of the enterprise. The Court at 407 U.S. 93 described the relatioship between state law and creditors in these terms:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official

> reviews the basis for the claim to repossession, and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.

Thus, Fuentes sustains the conclusion that when, as here, a creditor unilaterially invokes a prejudgment attachment statute to have state agents attach his debtor's goods, it is apparent that the creditor acts under color of state law as a willful participant with the state's agents in a joint undertaking. No other source endows him with the power to enlist the services of state officials for his private

advantage before adjudication of the debtor's right to possession.

To be sure, as the majority opinion points out, a private person acts under color of law when he conspires with a public official to corrupt or subvert state power. See Dennis v. Sparks, 49 U.S.L.W. 4001 (U.S. Nov. 17, 1980). Fuentes, however, explains at 407 U.S. 93 that this is not the only way in which a private person can act under color of law. Indeed, the conclusion this dissent reaches is not unique. Other courts have not questioned that under circumstances essentially

similar to those in this case a creditor acts under color of law within the contemplation of §1983. See, e.g., Welsh v. Kinchla, 577 F.2d 767, 769 (1st Cir. 1978); G. H. McShane Co., Inc. v. McFadden, 554 F.2d 111, 113 (3d Cir. 1977); Kacher v. Pittsburgh National Bank, 545 F.2d 842, 847 (3d Cir. 1976); Tucker v. Maher, 497 F.2d 1309, 1315 (2d Cir. 1974); Rios v. Cessna Finance Corp., 488 F.2d 25, 28 (10th Cir. 1973); Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085, 1092 (D.Me. 1973)(three-judge court.)[4]

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4. In all of these cases, save Gunter where the issue of damages was

I would vacate the district court's judgment of dismissal and remand the case for further proceedings consistent with this opinion.

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4. (cont'd)
deferred, judgment was entered for the creditors because they acted in good faith when they attached the debtor's property. In the case before us, the debtor alleged that the creditor acted maliciously, and this allegation apparently would satisfy the pleadings required by the cases cited in the text. Be that as it may, the question of the creditor's good faith is not before us in this appeal. As we have previously mentioned, Gomez v. Toledo, 100 S. Ct. 1920, 1924 (1980), now establishes that good faith is an affirmative defense rather than an element of a cause of action under §1983.

WIDENER, Circuit Judge, concurring in the result:

I think it sufficient to hold under Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and District 28, UMWA v. Wellmore Coal Corp. 609 F2d 1083 (4th Cir. 1979), that a private litigant who does no more than invoke a presumptively valid State judicial procedure, although he may have acted with malice, has not acted under color of State law and thus is not subject to suit under 42 U.S.C. §1983.

MURNAGHAN, Circuit Judge, dissenting:

In large measure I agree with what Judge Butzner has written. I write separately only to call attention to a point or two which seem to merit mention.

1. Judge Butzner tellingly quotes from Fuentes v. Shevin, 407 U.S. 67, 93 (1972) its description of a situtation (replevin under a conditional sales contract) essentially identical with our circumstances of a pre-judgment attachment.[1] That language, especially the reference

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1. The reference in footnote 23, 407 U.S. at 91, to attachment essential to the securing of the state court's jurisdiction does not reach the present case, where non-residency of the defendant in the state court proceeding did not exist.

to "private parties, serving their own private advantage" indicates that, on the rationale of Judge Phillips in the majority opinion, even after the statute has been authoritatively declared to be unconstitutional, a private individual who manages to prevail upon a bumbling, but non-conspiring clerk to issue a replevin writ under the blatantly unconstitutional statute would still not be acting under color of state law, and, hence, would not infringe 42 U.S.C. §1983. That result seems inescapably wrong.

2. Given the extant decisions, expecially Fuentes v. Shevin, the

constitutionality of the state attachment statute is, at the least, questionable.[2] A hearing is necessary. However, it is desirable to point out that such may not always be so, or that, in another case, regardless of constitutionality, good faith, while normally a matter of affirmative defense, might stand established from the pleadings, or from what the court might accept as a matter of judicial notice. There are situations where tremors first

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2. The absence of any requirement for pre-seizure judicial action renders the statute suspect.

introduce a breach in what theretofore has been regarded as a solid, safe, and impenetrable legal wall. Such was, perhaps, the case with the seemingly unquestioned validity of wage garnishment and replevin under conditional sales contracts, each obtained without judicial intervention, until Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes first entered upon the scene. Before the decisions in those cases, a judgment for defendants in a §1983 action probably would have been in order, even at the Fed. R. Civ. P. 12(b) stage. An allegation similar to the essentially conclusory

allegation that attachment had been maliciously invoked would probably have been accorded little weight.

But such is not the case here, for Fuentes was decided eight years ago. The wall formerly impenetrable is honeycombed with fissures. The attachment act evidently may be unconstitutional and defendants may have been chargeable with, at least, answerability should the act be found to violate the Fourteenth Amendment.

NO. 80-1730

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In the Supreme Court of the United States

October Term, 1981

GILES M. LUGAR

Petitioner

v.

EDMONDSON OIL COMPANY, INC.

and

RONALD L. BARBOUR

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed April 6, 1981
Certiorari Granted June 15, 1981

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RELEVANT DOCKET ENTRIES

	RECORD NUMBER
Plaintiff's Complaint - (Filed Feb. 8, 1978) (With Exhibits)	None. No listing made by Clerk of District Court
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Memorandum Opinion & Order (Filed July 17, 1978)	
Notice of Appeal - (Filed August 18, 1978)	
Opinion of United States Court of Appeals for the Fourth Circuit (Decided January 3, 1981)	
Judgment of United States Court of Appeals for the Fourth Circuit (Filed January 9, 1981)	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

GILES M. LUGAR
Plaintiff

v.

EDMONDSON OIL COMPANY, INC.
and
RONALD L. BARBOUR
Defendants

COMPLAINT
78-0020

1. Ronald L. Barbour is sole stockhold (sic), President of and an employee of Edmondson Oil Company, Inc.

2. Jurisdiction of this court is claimed under §1331 and §1343, Chapter 28, U.S.C. and §1983, Chapter 42, U.S.C., and the amount in controversy exceeds $10,000.00.

3. On April 1, 1977, Ronald L Barbour, acting for himself and for Edmondson Oil Company, Inc. filed a petition for attachment against Giles M. Lugar and others in the office of

the Clerk of the Circuit Court of Pittsylvania Count, Virginia. This attachment was filed under the authority of what is now Chapter 20, Code of Va., §§8.01-533, et. seq. (a copy thereof is filed as Exhibit A).

4. On April 1, 1977, the Clerk of the Pittsylvania County Circuit Court issued the Attachment Order commanding the Sheriff of Pittsylvania County, Virginia to attach and levy upon the property of Giles M. Lugar found in Pittsylvania County, Virginia (a copy of this order is filed as Exhibit B). The Clerk was acting under the provisions of what are now §§8.01-540 and 8.01-541 of the Code of Va.

5. The Sheriff of Pittsylvania County acting under the Attachment Order, did levy on and attach the property of Giles M. Lugar on April 1,

1977, April 2, 1977, and April 4, 1977, (a copy of the Sheriff's return is attached as Exhibit C).

6. Prior to filing its Petition for Attachment and the levy and attachment by the Sheriff, neither Edmondson Oil Company, Inc. nor Ronald L. Barbour filed a bond, nor did they file any security to protect the levy and attachment.

7. At no time prior to the Sheriff being ordered to levy upon and attach the properties of Giles M. Lugar did Edmondson Oil Company, Inc. or Ronald L. Barbour establish before a Judicial Officer a factual basis of the need to resort to this remedy as a means of preventing removal or disruption of assets.

8. The attachment ordered the Sheriff to summons Giles M. Lugar to

appear in the Circuit Court of Pittsylvania County at 9:00 a.m., April 18, 1977.

9. The first judicial hearing on the attachment was conducted on April 19, 1977. The court order as a result of this hearing was not entered until May 4, 1977, thirty-four days after the attachment.

10. The Petition for Attachment (Exhibit A) sworn to by Ronald L. Barbour for Edmondson Oil Company contains only conclusory allegations.

11. The Clerk of the Circuit Court of Pittsylvania County, Virginia, and the Sheriff of Pittsylvania County, Virginia, are constitutional officers whose duties are mandated by the Constitution and laws of the State of Virginia.

12. By order entered May 4, 1977,

a copy of which is attached as Exhibit D, the Circuit Court of Pittsylvania County, Virginia, held that Edmondson Oil Company, Inc. had presented no evidence sufficient to establish the ground for the attachment and had failed to bear its burden of proof; ordered that the attachment be dismissed, and ordered that monies held by a receiver be paid to Mr. Lugar.

13. At all times alleged herein, Ronald L. Barbour and Edmondson Oil Company, Inc. were willing participants with the State of Virginia; and Edmondson Oil Company, Inc. and Ronald L. Barbour and were acting under color of state law.

14. Giles M. Lugar has been deprived of his property by state action without due process of law as guaranteed under the Fifth and Fourteenth Amendments

to the United States Constitution.

15. The actions described herein of Edmondson Oil Company, Inc. and Ronald L. Barbour, acting under color of state law, deprived Giles M. Lugar of his right of due process in violation of §1983, Title 42, U.S.C.

16. As a result of the deprivation of his right of due process, Giles M. Lugar has suffered loss of his business assets, incurred judgments against the business and himself personally, has had the bank threaten foreclosure on his home, suffered humiliation, loss of credit, loss of business reputation, physical injury and will continue to incur loss and damages in the future.

WHEREFORE, Giles M. Lugar moves for judgment against Ronald L. Barbour and Edmondson Oil Company, Inc. for $250,000.00 plus costs, plus attorney's fees.

COUNT II

1. Plaintiff is a resident of Pittsylvania County, Virginia.

2. Edmondson Oil Company, Inc. is a Virginia corporation. Ronald L. Barbour resides in Pittsylvania County, Virginia.

3. Jurisdiction of this court is claimed under §1331 and §1343, Chapter 28, U.S.C. and §1983, Chapter 42, U.S.C. and the amount in controversy exceeds $10,000.00.

4. On April 1, 1977, Ronald L. Barbour, acting for himself and for Edmondson Oil Company, Inc. filed a petition for attachment against Giles M. Lugar and others in the office of the Clerk of the Circuit Court of Pittsylvania County, Virginia. This attachment was filed under the authority of what is now Chapter 20, Code of Va., §§8.01-533, et. seq. (a copy there of filed as

Exhibit A).

5. On April 1, 1977, the Clerk of Pittsylvania County Circuit Court issued the Attachment Order commanding the Sheriff of Pittsylvania County, Virginia, to attach and levy upon the property of Giles M. Lugar found in Pittsylvania County, Virginia (Copy of this order is filed as Exhibit B). The Clerk was acting under the provisions of what are now §§8.01-540 and 8.01-541 of the Code of Va.

6. The Sheriff of Pittsylvania County did levy on and attach the property of Giles M. Lugar on April 1, 1977, April 2, 1977, and April 4, 1977, (A copy of the Sheriff's return is attached as Exhibit C).

7. Prior to filing its Petition for Attachment and the levy and attachment by the Sheriff, neither Edmondson

Oil Company, Inc. nor Ronald L. Barbour filed a bond, nor did they file any security to protect the levy and attachment.

8. At no time prior to the Sheriff being ordered to levy upon and attach the properties of Giles M. Lugar did Edmondson Oil Company, Inc. or Ronald L. Barbour establish before a Judicial Officer a factual basis of the need to resort to this remedy as a means of preventing removal or disruption of assets.

9. The attachment ordered the Sheriff to summons Giles M. Lugar to appear in the Circuit Court of Pittsylvania County at 9:00 a.m., April 18, 1977.

10. The first judicial hearing on the attachment was conducted on April 19, 1977. The court order as a result of

this hearing was not entered until May 4, 1977, thirty-four days after the attachment.

11. Following the provision of §8.01-552 of the Code of Va., on April 5, 1977, Giles M. Lugar filed an affadavit of substantial defense. Ten days later Edmondson Oil Company filed a bond as required by this same code section.

12. The Petition for Attachment (Exhibit A) sworn to by Ronald L. Barbour for Edmondson Oil Company, Inc. contains only conclusory allegations.

13. The Clerk of the Circuit Court of Pittsylvania County, Virginia, and the Sheriff of Pittsylvania County, Virginia, are Constitutional Officers whose duties are mandated by the Constistution and Laws of the State of Virginia.

14. Because of the levy and of the attachment of the Sheriff of Pittsylvania

County, Virginia, Giles M. Lugar was unable to operate his business as Lakewood Truck Center; therefore, he had no income with which to pay his business debts.

15. By order entered May 4, 1977, a copy of which is attached as Exhibit D, the Circuit Court of Pittsylvania County, Virginia, held that Edmondson Oil Company, Inc. had presented no evidence sufficient to establish the grounds for the attachment; had failed to bear its burden of proof; ordered that the attachment be dismissed; and ordered that monies held by a receiver be paid to Mr. Lugar.

16. Ronald L. Barbour is sole owner of Edmondson Oil Company, Inc and Lakewood Truck Center, Inc., both corporations.

17. On May 12, 1977, Lakewood

Truck Center, Inc. filed a petition for temporary injunction against Giles M. Lugar evicting him from his business premises for failure to do business. A copy is attached as Exhibit E.

18. On May 17, 1977, trial was had on a debt owed by Giles M. Lugar to Edmondson Oil Company,Inc. and judgment was entered in the sum of $41,983.13 against Giles M. Lugar.

19. Part of the proof against Giles M. Lugar was that he had made no payment on his debt since April 1, 1977, the date of the attachment.

20. On May 17, 1977, contrary to Virginia law, Ronald L. Barbour and Edmondson Oil Company, Inc. caused the Clerk to issue an Execution on the judgment obtained against Giles M. Lugar on May 17, 1977.

21. On June 21, 1977, Edmondson

Oil Company, Inc. caused another execution to issue on this same indebtedness.

22. On June 23, 1977, Edmondson Oil Company, Inc. caused an additional execution to issue on this same indebtedness.

23. During April, 1977, Giles M. Lugar conducted a physical inventory of his business. This inventory showed the value of the inventory of his business seized by Edmondson Oil Company, Inc. to be $27, 895.42.

24. On July 14, 1977, the Sheriff of Pittsylvania County, Virginia, acting persuant (sic) to the Clerk's executions, sold the inventory of Giles M. Lugar's business.

25. Ronald L. Barbour, owner and President of Lakewood Truck Center and owner and President of Edmondson Oil

Company, Inc. purchased the business inventory of Giles M. Lugar for $49.00.

26. In March, 1976, Giles M. Lugar borrowed $30,000.00 from the Virginia National Bank, guaranteed by the Small Business Administration, secured by a second Deed of Trust on his residence. This money was used as partial payment for his business.

27. Since his business was closed down by the attachment, Giles M. Lugar has been unable to make regular payment to Virginia National Bank. The bank has advised that it will forclose on the Deed of Trust. The Small Business Administration is threatening suit against Mr. Lugar and his wife.

28. At the time his business was closed down by the attachment, Giles M. Lugar had more than $39,000.00 in accounts receivable.

29. Since the attachment Giles M. Lugar has received the benefit of some of his accounts receivable. The balance have been lost.

30. At the present time Giles M. Lugar has business debts which he is unable to pay because of the attachment.

31. At all times alleged herein, Ronald L. Barbour and Edmondson Oil Company, Inc. were willing participants with the State of Virginia; Edmondson Oil Company, Inc. and Ronald L. Barbour were acting under color or state law.

32. Giles M. Lugar has been deprived of his property by state action without due process of law as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

33. The actions described herein of Edmondson Oil Company, Inc. and Ronald L. Barbour, acting under color of

state law, deprived Giles M. Lugar of his right of due process in violation of §1983, Title 42, U.S.C.

34. Because of the malicious, wanton, willful, opressive (sic), unlawful acts of Ronald L. Barbour and Edmondson Oil Company, Inc., Giles M. Lugar has incurred substantial attorney's fees, lost his business assets, is about to lose his home, has been unable to pay his business debts, has had judgment returned against him personally for business debts, has suffered and will suffer in the future grievous mental and physical mental pain and suffering, has suffered and will suffer in the future great humiliation and loss of reputation, has suffered and will suffer in the future damage to his family relationships; has incurred irreparable injury to his credit reputation.

WHEREFORE, Giles M. Lugar moves this Court for compensatory damages of $250,000.00, punitive damages of $250,000.00 and the costs of this action.

COUNT III

1. Edmondson Oil Company, Inc. is a Virginia corporation. Ronald L. Barbour owns all the stock of Edmondson Oil, Inc., is President of Edmondson Oil Company, Inc., and at all times herein was acting as a duly authorized agent of Edmondson Oil Company, Inc.

2. On March 31, 1977, Ronald L. Barbour swore out a Petition for Attachment for Edmondson Oil Company, Inc. against Giles M. Lugar, a copy of which is attached hereto as Exhibit A.

3. On April 1, 1977, the Sheriff of Pittsylvania County, Virginia, levied upon, attached, and seized the business

assets of Giles M. Lugar.

4. At the time he swore to the Petition for Attachment for Edmondson Oil Company, Inc. against Giles M. Lugar, neither Ronald L. Barbour nor Edmondson Oil Company, Inc. had good cause to believe facts which would support the allegations required by §8.01-534. Code of Va.

5. The actions of Edmondson Oil Company, Inc. and Ronald L. Barbour in swearing out the petition for attachment constitutes deliberate oppression, was done maliciously, showed willful disregard for the rights of Giles M. Lugar and demonstrates an intent to unlawfully put Giles M. Lugar out of business.

6. Because of the malicious, wanton, willful, opressive (sic), unlawfu acts of Ronald L. Barbour and Edmondson Oil Company, Inc., Giles M. Lugar has

incurred substantial attorny's fees, lost his business assets, is about to lost his home, has been unable to pay his business debts, has had judgment returned against him personally for business debts, has suffered and will suffer in the future grievous mental and physical mental pain and suffering, has suffered and will suffer in the future great humiliation and loss of reputation, has suffered and will suffer in the future damage to his family relationships. has incurred irreparable injury to his credit reputation.

7. This Court has pendent or ancillary jurisdiction over this count because it states a separate but paral-let cause of action to the Federal questions pled in Counts One and Two.

WHEREFORE, Giles M. Lugar moves

this Court for actual damages of $250,000.00, punitive damages of $250,000.00 plus the costs of this action.

GILES M. LUGAR

By Counsel

Of Counsel

Gary L. Bengston, P.C.

by (s) Gary L. Bengston

Gary L. Bengston
127 Tunstall Road
Danville, Virginia 24541
797-4010

EXHIBIT A
VIRGINIA: IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

EDMONDSON OIL COMPANY, INC.
Plaintiff

v.

GILES M. LUGAR
Principal Defendant

VIRGINIA NATIONAL BANK
Co-Defendant

FIRST VIRGINA BANK, SOUTH
(formerly Schoolfield Bank
and Trust Company)
Co-Defendant

* * * * *

PETITION FOR ATTACHMENT

TO THE HONORABLE W. CARRINGTON THOMPSON, JUDGE OF SAID COURT:

Your petitioner would represent to the Court that the principal defendant, Giles M. Lugar, is justly and truly indebted to plaintiff in the sum of $41,983,12, part of which is due and payable, and a portion of which is due and payable on or after April 1, 1977. The said indebtedness is due by

reason of products and merchandise delivered and sold to Giles M. Lugar by plaintiff. Therefore, plaintiff ought to recover at least the sum of $41,983.12, with interest on $21,983.13 from March 10, 1977, and with interest on the balance from April 1, 1977.

Your petitioner alleges that it has grounds for attachment as follows: Giles M. Lugar is (1) converting or is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities, or other evidences of debt, with intent to hinder and delay his creditors, among them being plaintiff, and (2) has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder or delay his creditors, among them being plaintiff.

Your petitioner further believes and

alleges that Giles M. Lugar has on deposit to his credit, control, or ownership, real or beneficial, funds of money, notes or other choses in action, securities or intangibles, in the co-defendant, Virginia National Bank, Danville, Virginia, and First Virginia Bank, South, Danville, Virginia (formerly, Schoolfield Bank & Trust Company, Danville, Virginia), which said co-defendant banks petitioner prays be made a party hereto, and each be required to disclose the nature and amount said property of Giles M. Lugar which is in the actual or constructive possession of each of said co-defendants.

Your petitioner further alleges that defendant, Giles M. Lugar, owns, or has constructive possession of certain tangible and intangible personal

property, to-wit: wreck truck T258-676, service truck GUX-809, petroleum products (gas and diesel fuels), tires, batteries, tubes, miscellaneous motor vehicle parts and accessories, cash registers, trade accounts receivable, credit card receipts and invoices, credit memoranda, checks, ledger account cards, and other equipment, tools, inventory, furnishings, cash on hand, which constitute estate of the said principal defendant.

WHEREFORE, petitioner prays that all the aforesaid property in the hands or possession of the co-defendant, principal defendant, or owned by the principal defendant, be attached by order of this Court; that the same be sold of liquidated to satisfy the claim of petitioner; that Giles M. Lugar be enjoined from any act, or attempt to act in such way as his estate or part there of might not be

available to answer petitioners claim.

Edmondson Oil Company,
Incorporated

(s) H. Victor Millner, Jr.

H. Victor Millner, Jr.
Chatham, Virginia
Counsel

I, Ronald L. Barbour, President of Edmondson Oil Company, Incorporated, a Virginia corporation, being duly sworn, state that I am aware of the facts stated in the foregoing Petition for Attachment, and the same are true to the best of my knowledge and belief.

(s) Ronald L. Barbour
Ronald L. Barbour
President of
Edmondson Oil Company
Incorporated

STATE OF VIRGINIA
COUNTY OF PITTSYLVANIA: to-wit:

Sworn to and subscribed before, Betty Sue Hodges, a Notary Public in and for the County and State aforesaid, this 31st. day of March, 1977.

My commission expires March 2, 1979.

(s)Betty Sue Hodges
Notary Public

EXHIBIT B

COMMONWEALTH OF VIRGINIA,

To the Sheriff of the County of Pittsylvania, Greeting, Edmondson Oil Company, Incorporated, Plaintiff, having filed before me, Clerk of the Circuit Court of Pittsylvania County a petition for an attachment against Giles M. Lugar, et al, principal defendant, to recover of said principal defendant the sum of $41,983.13 with interest on $21,983.13 from 3/10/77 and on balance from 4/1/77 dollars. And the said petition alleging that the plaintiff is entitled to or ought to recover, at the least, the sum of $41,982,13 dollars; and that the said claim became or will become due and payable at the time or times following, to-wit: April 1, 1977 and March 10, 1977, and that the said principal defendant is

removing or is about to remove out of this State with intent to change his domicile; and/or is converting or is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities, or other evidences of debt, with intent to hinder and delay his creditors, among them being plaintiff, and (2) has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder or delay his creditors, among them being plaintiff.

THEREFORE, WE COMMAND YOU, That you attach and levy upon the property mentioned and sought to be attached in the said petition, to-wit: wrecker T-258-676, Chevrolet service truck GUX-809, various parts, inventory, tires, batteries, tubes, miscellaneous auto

supplies, petroleum products (gas and diesel fuel) in tanks, accounts receivable, ledger cards, cash registers, tools, checks and so much of the lands, tenements, goods, chattels, moneys and effects of the said principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand.

WE FURTHER COMMAND That you summon the said principal defendant Giles M. Lugar to appear before our said Circuit Court at 9:00 o'clock a.m. on the 18th day of April, 1977, to answer said petition or state grounds of his defense thereto.

AND WE FURTHER COMMAND YOU To summon the said co-defendant Virginia National Bank and First Virginia Bank, South to appear in person at the same time and place and submit to an exami-

nation on oath touching ____ indebtedness to the said principal defendant and the real or personal property of the said principal defendant in its possession, or with the consent of the Court, first obtained, file an answer in writing, under oath, stating whether or not it is so indebted, and if so, the amount and the time of maturity of said debt, and whether there is in its possession any such real or personal property belonging to the said principal defendant and, if so, the nature and value thereof. And that you then and there make return of this writ of attachment and how you have executed the same.

WITNESS, S. W. Swanson, Clerk of said Court, the 1 day of April, 1977.

By: (s) Beth W. Roark

Deputy Clerk

EXHIBIT C

COMMONWEALTH OF VIRGINIA:

To the Sheriff of the County of Pittsylvania, Greeting, Edmondson Oil Company, Incorporated, Plaintiff, having filed before me, Clerk of the Circuit Court of Pittsylvania County a petition for an attachment against Giles M. Lugar, et al, principal defendant, to recover of said principal defendant the sum of $41,983.13 with interest on $21,872.13 from 3/10/77 and on balance from 4/1/77 dollars. And the said petition alleging that the plaintiff is entitled to or ought to recover, at the least, the sum of $41,982.13 dollars; and that the said claim became or will become due and payable at the time or times following to-wit: April 1, 1977 and March 10, 1977, and that the said principal defendant is

removing or is about to remove out of this State with intent to changes his domicile; and/or is converting or is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities, or other evidences of debt, with intent to hinder and delay his creditors, among them being plaintiff, and (2) has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder or delay his creditors, among them being plaintiff.

THEREFORE, WE COMMAND YOU, That you attach and levy upon the property mentioned and sought to be attached in the said petition, to-wit: wrecker T-2580787, Chevrolet service truck GUS-809, various parts, inventory, tires, batteries, tubes, miscellaneous auto

supplies, petroleum products (gas and diesel fuel) in tanks, accounts receivable, ledger cards, cash register, tools, checks and so much of the lands, tenements, goods, chattels, moneys and effects of the said principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand.

WE FURTHER COMMAND That you summon the said principal defendant Giles M. Lugar to appear before our said Circuit Court at 9:00 o'clock a.m. on the 18th day of April, 1977, to answer said petition or state grounds of his defense thereto.

AND WE FURTHER COMMAND YOU To summond the said co-defendant Virginia National Bank and First Virginia Bank, South to appear in person at the same time and place and submit to an exami-

nation on oath touching _____ indebtedness to the said principal defendant and the real or personal propety of the said principal defendant in its possession, or with the consent of the Court, first obatined, file an answer in writing, under oath, stating whether or not it is so indebted, and if so, the amount and the time of maturity of said debt, and whether there is in its possession any such real or personal property belonging to the said principal defendant and, if so, the nature and value thereof. And that you then and there make return of this writ of attachment and how you have executed the same.

WITNESS, S. W. Swanson, Clerk of said Court, the 1 day of April, 1977.

By: (s) Beth W. Noark

Deputy Clerk

Executed on the 4th day of April, 1977, by delivering a true copy of the within levy & attachment to Lynwood Lindsey in person within my County.

(s) Michael W. Taylor, Deputy
for T. E. McGregor, Sheriff of
Pittsylvania County, Va.

Executed on the 2nd day of April, 1977, by delivering a true copy of the within levy & attachment to Giles M. Lugar, in person within my County.

(s) Michael W. Taylor, Deputy
for T. E. McGregor, Sheriff of
Pittsylvania County, Va.

Executed on the 4th day of April, 1977, by delivering a true copy of the within levy & attachment to T. M. Collie, in person within my County.

(s) Michael W. Taylor, Deputy
for T. E. McGregor, Sheriff of
Pittsylvania County, Va.

Executed on the 1st. day of April, 1977 by levying on one GMC (860) Wrecker, License T-258-676, Ind. No. D86253748J, Title No. 21566223, one 1970 Chevrolet Service truck, License No. GUX0809, Virginia, Ind. No. CE130B107252, Title No. 21566222, and all equipment on service truck, various parts, inventory, tires, batteries, tubes miscellaneous auto and truck supplies, petroleum products (gas and diesel fuel) in tanks, accounts receivable, ledger cards, cash register and tools, and checks and currency all belonging to Giles M. Lugar and leaving all in his possession. (See itemized list attached)

(s) Michael W. Taylor, Deputy
For T. E. McGregor, Sheriff

Executed on the 4th day of April, 1977 by attaching accounts belonging to Mr. Giles Lugar at the Virginia National Bank and

First Virginia Bank-South.

(s) Michael W. Taylor, Deptuy
For T. E. McGregor, Sheriff

EXHIBIT D

VIRGINIA: IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

EDMONDSON OIL COMPANY, INC.
Plaintiff

v.

GILES M. LUGAR, ET AL
Defendant

* * * * *

ORDER

This cause came on before this Court to be heard on the 19th day of April, 1977, the return date of the levy in this proceeding being on the 18th of April, 1977.

The various parties were present in person and by counsel, and evidence was presented to the Court in support of the attachment proceeding and levy made by the plaintiff, Edmondson Oil Company, Inc. and in defense thereto by the defendant, Giles M. Lugar.

And the Court having heard the evidence and argument of counsel, and being fully advised, is of the opinion that the plaintiff, Edmondson Oil Company, Inc., has failed to bear its burden of proof and has presented no evidence sufficient to establish the grounds of the attachment issued against the defendant, Giles M. Lugar. It is therefore the opinion of the Court that this attachment should be dismissed.

WHEREFORE, it is ORDERED that the attachment and levy made by the plaintiff, Edmondson Oil Company, Inc., against the defendant, Giles M. Lugar, be and hereby is dismissed.

It appearing to the Court further that certain funds are being held by the receiver of the Court, Fidelity American Bank of Chatham, Virginia, on behalf of the parties during the

pendency of the proceeding, and the plaintiff having failed to prove its cause, the receiver is hereby ordered to deliver these funds to the attorneys for the defendant, Giles M. Lugar.

It appearing that there are yet further matters which remain to be determined between the parties, this cause is ordered continued on the docket for such further proceedings as may be proper.

ENTER: 5/4/77

(s) W. C. Thompson

We ask for this Order:

GARY L. BENGSTON, P.C.

By (s) Robert L. Morrison, Jr.
Robert L. Morrison, Jr.
127 Tunstall Road
Danville, VA 24541

Seen and objected to and entered prior to endorcement by

(s) H. Victor Millner, Jr.
H. Victor Millner, Jr.
Counsel for Plaintiff

EXHIBIT E

(Title omitted in printing)

CIRCUIT COURT OF PITTSYLVANIA COUNTY

BILL FOR INJUNCTION

TO THE HONORABLE W. CARRINGTON THOMPSON, JUDGE OF SAID COURT:

Plaintiff, a Virginia corporation, would show to Your Honor the following:

1. That it is the owner of a parcel of real estate in Pittsylvania County, Virginia, on Route 58, East of Danville, Virginia, upon which is situate a truck stop service station and other improvements, all generally known as Lakewood Truck Center.

2. That the premises were leased to Giles M. Lugar, the defendant herein, by a document dated October 1, 1975, which is filed herewith as plaintiff's Exhibit A. Said document is recorded in the Clerk's Office of this Court in Deed Book 615, page 29.

3. That by the terms of the lease, defendant was to pay monthly rent to plaintiff based on gallons of motor fuel delivered to it by the supplier, which was Edmondson Oil Company, Incorporated, in accord with the provisions of the agreement.

4. That on April 1, 1977, Edmondson Oil Company, Incorporated instituted an attachment proceeding against Giles M. Lugar, which was dismissed by order of this court April 29, 1977.

5. That Giles M. Lugar has not operated the facilities under the lease since April 1, 1977, and has in person and by counsel, made it obvious to plaintiff he does not intend to carry on any business in or on the premises, in that he has allowed the condition of the premises to deteriorate; the restaurant which was subleased by defendant

has closed and the renter absconded; defendant has surrendered his fuel tax permit to the Commonwealth; and has sought other employment. In addition, defendant has not paid the rent due on April 1, 1977, in the amount of $751.00; has closed its bank accounts, and refuses to allow plaintiff admission to the premises.

6. That the mutual purpose of the business arrangement envisioned by the lease agreement was the operation by the defendant of a retail truck stop. Plaintiff believes and here alleges that defendant does not intend to operate the business henceforth. Plaintiff further believes and here alleges that defendant is wilfully refraining from utilizing the premises in and for the manner and purpose of the agreement; that defendant is causing and intending to cause

plaintiff hardship and financial loss; that defendant has on the premises a large supply of inventory which is or should be available to plaintiff as security for its rent, miscellaneous damages and repairs beyond ordinary wear and tear; that defendant does not intend to pay for the use of the premises in derogation of the true spirit and intent of the business arrangement.

7. Plaintiff further believes and alleges that since defendant has manifested his intent to abandon the premises and to occupy the premises without compensation, his refusal to honor plaintiff's request for cooperation in obtaining re-entry represents an intentional deprivation of of plaintiff's property rights by defendant, resulting in or likely to result in irreparable damage by virtue of loss of rent, loss of potential purchasers,

vandalism, theft, high insurance rates, and overall loss of value due to continued disuse.

WHEREFORE, plaintiff, being without relief save in a court of equity, prays for a decree enjoining defendant from occupying the said premises and requiring defendant set over and deliver to plaintiff, or its authorized agent full possession of the premises, with such colateral outlines for use or disposition of defendant's personal property as may seem proper; and enjoining defendant from removing or disposing of assets which are or should be available distraint for plaintiff's rent, and further enjoining defendant from intentionally and wilfully depriving plaintiff of it property rights and its right to protect and enhance its property, and for such other relief as the nature of the case may require.

Lakewood Truck Center, Inc.

By Counsel

Vansant & Millner
Chatham, Virginia
Counsel

By (s)_____

(Title omitted in printing)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS
CIVIL ACTION 78-0020

TO THE HONORABLE JUDGE OF SAID COURT:

The defendants, Edmondson Oil Company and Ronald L. Barbour, jointly, by counsel, move the Court to abstain from hearing and dismiss the complaint in this suit, on the grounds that the complainant challenges the constitutionality of a statute of the Commonwealth of Virginia, and decision on that issue may be rendered unnecessary by a decision of the courts of Virginia as a matter of state law.

Edmondson Oil Company
By Counsel

Ronald L. Barbour
By Counsel

Vansant, Millner & Vines
Chatham, Virginia
Counsel

By _____

Young, Kiser, Haskins,
Mann, Gregory & Young, Ltd.
Martinsville, Virginia
Counsel

By _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

GILES M. LUGAR

V.

EDMONDSON OIL COMPANY, INC.
and
RONALD BARBOUR

MEMORANDUM OPINION AND ORDER

* * * * *

See Petition for Certiorari pp. 32-41

(Rule 30.1)

(Title omitted in printing)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA

MOTION TO AMEND JUDGMENT
(CIVIL ACTION 78-0020)

TO THE HONORABLE JUDGES OF SAID COURT:

Comes now the plaintiff, Giles M. Lugar, by counsel and files herewith the following motion to amend the judgment of the court entered on the 17th day of July, 1978, dismissing the plaintiff's complaint.

The plaintiff moves the court that the court's order of summary dismissal be revoked and that this matter be reinstated on the docket for further proceedings as provided by law.

The grounds of this motion are:

1. That the court has dismissed this action by reason of failing to state a claim cognizable under Federal law.

2. The complaint filed by the plaintiff specifically alleges involvement of the Commonwealth of Virginia and actions taken under the laws of the Commonwealth of Virginia which would not have been possible without the active and willing cooperation of the Commonwealth and its officers.

3. That the authority cited by the court has grounds for the summary dismissal of the plaintiff's complaint involves action by private individuals without overt action or cooperation by state officials and is not applicable to the facts of this situation.

4. That the parties were not given the opportunity to state their positions and supply evidence and law in support of their positions as required by the Fifth Amendment to the United States Constitution.

Wherefore the plaintiff respectfully moves this honorable court that this court enter its order revoking the judgment order of the 17th day of July, 1978, and providing a time and place for the parties to appear and be heard before making any disposition of this action.

A memorandum in support of this motion will be filed within the ten days next following the filing of this motion.

Respectfully submitted,

GILES M. LUGAR

By Counsel

Of counsel

ROBERT L. MORRISON, JR.

By Robert L. Morrison, Jr.
609 Keen Street - Suite 103
P. O. Box 3741
Danville, VA 24541

(Title omitted in printing)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

ORDER
(CIVIL ACTION 78-0020)

Plaintiff filed a Motion to Amend Judgment on July 27, 1978, and certified that he mailed a copy to the defendants' attorneys on July 28, 1978. The judgment which plaintiff seeks to amend was entered on July 17, 1978. According to Rule 59(e) of the Federal Rules of Civil Procedure:

> [a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Plaintiff did not serve his motion to amend the judgment until 11 days after entry of the judgment. The court is without the discretion to enlarge the time for serving a motion pursuant to Rule 59(e). See FRCP 6(b). The court

therefore denies plaintiff's motion because it was not timely served. The effect of said denial is to reaffirm the judgment of July 17, 1978, heretofore entered.

Plaintiff, by reason of excusable neglect has moved to this court pursuant to Rule 4(a) of the Rules of Appellate Procedure for an extension of time in which to file a notice of appeal. The court finds that plaintiff has made a showing of excusable neglect and hereby grants plaintiff 30 days from this date in which to file the notice of appeal.

The clerk is directed to send a copy of this order to counsel of record.

ENTER: Joyce F. Witt, Clerk

By: (s) B. Gibson
Deputy Clerk

(s) Ted Dalton
United States District Judge

August 14, 1978

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GILES M. LUGAR

V.

EDMONDSON OIL COMPANY, INC.
and
RONALD BARBOUR

OPINION

* * * * *

See Petition for Certiorari pp. 42-129

(Rule 30.1)

J U D G M E N T

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 78-1717

Giles M. Lugar, Appellant

v.

Edmondson Oil Company,
Ronald L. Barbour, Appellees

Appeal from the United States District Court for the Western District of Virginia

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from , in this cause, be, and the same is hereby, affirmed.

(s) William K. Slate, II
CLERK

Office-Supreme Court, U.S.
FILED
MAY 13 1981
ALEXANDER L. STEVAS,
CLERK

NO.
80-1730

IN THE

Supreme Court of the United States

October Term, 1980

GILES M. LUGAR,
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jackson L. Kiser
Young, Kiser, Haskins,
Mann, Gregory & Young
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24112
703-638-2367
Counsel for Respondents

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APPELLATE PRINTING SERVICES, INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

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Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807 . 9

INTRODUCTION

Giles M. Lugar, Plaintiff in the trial court, will hereafter be referred to as "Petitioner". Edmondson Oil Company, Inc., and Ronald L. Barbour, Defendants in the trial court, will hereafter be referred to as "Respondents". All references to the Petition for Writ of Certiorari will be designated "P" with the appropriate page number. References to the trial court record will be designated "R" and assigned the appropriate index number assigned by the Clerk of the District Court.

STATEMENT OF THE CASE

Petitioner's Statement of Facts generally accurately reflect the allegations set forth in the Petitioner's Complaint, however, it should be pointed out that the allegations as to Count I, the Count dealing exclusively with the

attachment procedures, do not contain an allegation of malice. It is not until Count II that an allegation of malice is made and that Count lumps together the levy made pursuant to the attachment statute as well as the seizures made pursuant to a Writ of Fieri Facias based on a judgment after a trial on the merits of the case. The Sheriff's action pursuant to the Writ of Fieri Facias is not here questioned by the Petitioner.

Count III of the Complaint does not claim a violation of any constitutionally protected rights and is not at issue in the Petition.

ISSUES

1. A Petitioner, who did not challenge the constitutionality of Virginia attachment statutes in the District Court and the Circuit Court has no standing to challenge the constitutionality of them

in this Court.

2. The Virginia attachment statutes, even if challenged, meet the test of due process as articulated by this Court.

3. A private litigant, acting independently, invoking a constitutionally valid statute does not act under "color of law" so as to furnish the necessary element of State action to sustain a claim pursuant to 42 U.S.C. 1983.

SUMMARY OF ARGUMENT

Petitioner did not challenge the constitutionality of the Virginia attachment statutes in the courts below and, therefore, should not be permitted to do so in this Court. The decisions of this Court and of various circuit courts cited by the Petitioner are distinguishable on that ground alone. Moreover, even should this Court choose to consider the constitutionality of the Virginia attachment

statutes, they will be found to meet the test of due process under this Court's decisions.

Given the constitutionality of the Virginia attachment statutes, there are no allegations in the Complaint which would support the element of State action necessary for an action laid under 42 U.S.C. 1983.

ARGUMENT

I.

THE PETITIONER DID NOT CHALLENGE THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES IN THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SAID STATUTES AT THIS STAGE OF THE CASE.

As noted in the District Court's opinion (P. 39), the Petitioner did not question, in the District Court, the constitutional validity of the Virginia attachment statutes. The District Court's

statement is amply supported by the Petitioner's Memorandum in Opposition to Respondents' Motion to Dismiss (R. 5). In his Memorandum, the Petitioner states:

> "The Defendants state... that the Plaintiff's claim for federal jurisdiction and his entire case is predicated upon the alleged absence of due process, by virtue of the application of State attachment statutes. This is incorrect. A reading of the Complaint...shows conclusively that the gravamen of this action is the alleged wrongful acts by the Defendant. No question of the constitutional validity of the State statutes is made." (emphasis supplied)

Again, in the en banc oral argument before the Fourth Circuit Court of Appeals, the Petitioner reiterated his disaffirmance of a challenge to the constitutional validity of the statutes. The Circuit Court took note of the Petitioner's position in its opinion when it stated:

> "...Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality,

> so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted, both in the district court and on appeal to this court." (P. 43)

Since the constitutionality of the Virginia statutes was not placed in question in either the District Court or the Circuit Court and was not decided by either court, Petitioner should not be permitted, for the first time, to challenge them here. California v. Taylor, 353 U.S. 553 (1957), and cf. Youkaim v. Miller, 425 U.S. 23 (1976). Thus, the decision of the Fourth Circuit Court of Appeals is neither in conflict with the decisions of this Court or any of the other circuit courts.

Petitioner cites in support of his position the decisions of this Court of Fuentes v. Shevin, 407 U.S. 67 (1972), and Lynch v. Household Finance Corp., 405 U.S. 538 (1972). These decisions

involved a direct, unequivocal challenge to the replevin statutes of the States of Florida and Pennsylvania in Fuentes and to the garnishment statute of the State of Connecticut in Lynch.

The same criticism is true of the circuit court cases cited by the Petitioner, viz., Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978); Guzman v. Western State Bank of Devil's Lake, North Dakota, 516 F.2d 125 (8th Cir. 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973); Jonnette v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976).

In both this Court's decisions and the Circuit Court's decisions, there was a direct constitutional attack on the statutes involved, and a decision was rendered based on the Court's analysis of the particular statute. State involvement

was undisputed and never an issue in any of these cases. Conversely, neither the District Court nor the Circuit Court reached the question of the constitutionality of the Virginia attachment statutes in the case at bar.

II.

THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES, BUT EVEN IF IT DOES UNDERTAKE A REVIEW OF THEM, THEY WOULD BE FOUND TO MEET THE TEST OF DUE PROCESS WHEN MEASURED BY THIS COURT'S PRIOR DECISIONS.

This Court's earlier decisions of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), must be read in light of its later decisions of Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc.,

v. Di-Chem, Inc., 419 U.S. 601 (1975).[1]

With the added gloss of Carey v. Sugar, 425 U.S. 73 (1976), Professor Brabham (note 1, supra) synthesizes the decisions and concludes that the provision for an early post-seizure hearing, wherein the creditor who instigates the seizure bears the burden of proof of establishing a prima facie case for seizure, plus a provision for assuring the creditor's ability to respond in damages for an unlawful seizure will meet the minimum requirements of due process.

Mitchell and Di-Chem unquestionably changed the requirement of preseizure notice and hearing as enunciated in the

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[1] An excellent analysis of the interrelationship of these decisions appears in Brabham, Sniadach through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, and Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807.

earlier cases of Sniadach and Fuentes. Mitchell and Di-Chem require only that an opportunity for an early hearing be provided. This position was subsequently reinforced by the cases of Mackey v. Montrym, 443 U.S. 1 (1979), and Berry v. Barchi, 443 U.S. 55 (1979).

Not only do the Virginia statutes meet the requirements of an early hearing and fiscal responsibility of the creditor, they go much further toward insuring the debtor a full measure of due process. A reading of the attachment statutes of the State of Virginia (1950 Code of Virginia, as amended) reveals a plan whereby, under circumstances which are basically limited to the loss or devaluation of security or property (§8.01-534, formerly §8-520), a claimant (§8.01-533, formerly §8-519) may upon a sworn petition before the clerk of court cause that clerk to issue a writ of attachment (§8.01-537, formerly §8-524;

and §8.01-540, formerly §8-526). The writ of attachment directs the sheriff to levy upon the property described in the writ (§8.01-546, formerly §8-533), but he is not empowered to seize the property unless the appropriate bond is posted (§8.01-551, formerly §8-538). The levy will be voided by the mere act of the debtor filing a verified grounds of substantial defense, if the creditor thereafter fails to post the proper bond (§8.01-552, formerly §8-539). Moreover, the debtor is given the opportunity to go immediately before the appropriate judge to contest the attachment, and if the judge finds that the grounds for the attachment do not exist or that there is little likelihood that the creditor will prevail on his claim,[2]

[2]See Carey v. Sugar, supra, where this Court apparently holds that had this issue been a permissible one for decision in a hearing under the New York statute, the statute would have met the minimum requirements of due process.

then the attachment will be quashed (§8.01-568, formerly §8-556). We see no substantial distinction between the attachment statutes of the State of Virginia and the sequestration statutes of the State of Louisiana which were approved by this Court in Mitchell with the exception of the issuing official being a clerk rather than a magistrate.[3]

Indeed, the Mitchell Court's description of an appropriate attachment procedure fits the Virginia statutes like a glove. There it was said:

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors without notice, hearing or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to

[3]Justice Powell in his concurring opinion in Di-Chem did not require the issuing official to be a judicial official, but only a neutral party. See Footnote 3 to concurring opinion, 419 U.S. 612.

establish in advance by attachment a lien dependent for its affect upon the result of the suit.' The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed by personal notice and a right to take the case to court, is a familiar method... and is open to no objection." 416 U.S. 613

In his article, Professor Brabham reviewed the Virginia attachment statutes vis-a-vis this Court's decisions and concluded:

> "The attachment statutes have areas that arouse suspicion about their constitutionality, but they appear capable of withstanding a challenge by a latter day Sniadach or Fuentes. After all, the Supreme Court has come full circle." (supra, n. 1, p. 199)

III.

A PRIVATE LITIGANT, ACTING IN CONJUNCTION WITH A PUBLIC OFFICIAL PURSUANT TO A VALID STATE STATUTE, DOES NOT ACT UNDER "COLOR OF LAW" UNLESS THERE IS A JOINT MERETRICIOUS RELATIONSHIP BETWEEN THE PRIVATE LITIGANT AND THE PUBLIC OFFICIAL TO IMPROPERLY USE THE POWER THE STATE HAS GRANTED TO THE PUBLIC OFFICIAL.

The majority opinion of the Fourth Circuit in reaching its decision in this case is eminently correct. It properly applies the principles of Dennis v. Sparks, U.S. , 101 Sup. Ct. 183, 49 USLW 4001 (Nov. 17, 1980), and Flagg Brothers v. Brooks, 436 U.S. 149 (1978). Further, in reviewing the decisions of this Court, the Circuit Court properly pointed to the decisions where the public official was improperly using his authority in conjunction with the private litigant to deprive a complainant of a constitutionally protected right.

Neither the Petitioner nor the dissenting judges in the Circuit Court have cited a case in which a public official acting in good faith in conjunction with a private litigant pursuant to a constitutionally valid statute, regardless of the purposes or motivation of the private litigant, has been able to furnish the

necessary "color of law" requirement to sustain an action under 42 U.S.C. 1983.

The dissenting opinion of the Circuit judges relies primarily on Fuentes in support of its rationale. Such reliance is misplaced because, as pointed out above, the act of the private litigant in Fuentes was taken in conjunction with a public official pursuant to an unconstitutional statute. Nowhere in the Fuentes opinion is it ever intimated that the action of the official issuing the writ of replevin or of the private litigant requesting it would have deprived the plaintiff of due process, but for the fact the action was taken pursuant to the constitutionally invalid statute.[4]

Assuming, arguendo, the Respondents in the case at bar were unjustified and,

[4]The concurring opinion of Judge Widener correctly identifies the flaw in the dissent's rationale.

indeed, acting with malice under the valid attachment statutes of the State of Virginia, their bad faith acts, without more, would not have been jointly shared by the officials involved in issuing and serving the writ of attachment. Without such a sharing, there would not be sufficient State involvement to support the "color of law" requirement of a Section 1983 action.

CONCLUSION

Petititioner has wholly failed to demonstrate any conflict in the decision in this case with decisions in other circuits or with the decisions of this Court, nor has he demonstrated any important question of federal law which has not been previously considered and passed upon by this Court. The Petition, therefore, should be denied.

Respectfully submitted,

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CERTIFICATE

This is to certify that I am duly admitted to practice before the United States Supreme Court and that I have this 13th day of May, 1981, mailed a true copy of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari to Mr. Robert L. Morrison, Jr., of Warren, Parker, Williams & Stilwell, 317 Patton Street, Suite B, Danville, Virginia, 24541, counsel for Petitioner.

Jackson L. Kiser
Jackson L. Kiser

APPENDIX

(Text of Virginia Code Sections
Cited in Argument)

§8.01-533 (formerly §8-519). Who may sue out attachment. -- If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, including rent, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exlusive of interest, he may sue out an attachment therefor on any one or more of the grounds stated in §8.01-534, except that if the claim be for a debt not due and payable no attachment shall be sued out when the only ground for the attachment is that the defendant, or one of the defendants against whom the claim is, is a foreign corporation, or is not a resident of this Commonwealth, and has estate, or has debts owing to such defendant, within this Commonwealth.

* * *

§8.01-534 (formerly §8-520). Grounds of attachment. -- It shall be sufficient ground for an attachment that the principal defendant or one of the principal defendants:

1. Is a foreign corporation, or is not a resident of this Commonwealth, and has estate or has debts owing to such defendant within the county or city in which the attachment is, or that such defendant being a nonresident of this Commonwealth, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word "estate," as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity;

2. Is removing or is about to remove out of this Commonwealth with intent to

change his domicile;

3. Intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this Commonwealth so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor should only the ordinary process of law be used to obtain the judgment;

4. Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors;

5. Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors;

6. Has absconded or is about to abscond from the Commonwealth or has concealed himself to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in subdivisions 4 and 5 above may be stated either in the alternative or conjunctive.

* * *

§8.01-537 (formerly §8-524). Petition for attachment; writ tax. -- A. Every attachment, except an attachment for rent, shall be commenced by a petition filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by subdivision 11 of §8.01-261. If it is sought to recover specific personal property the petition shall state the nature and estimated value thereof, the character of estate therein claimed by the plaintiff, and what sum, if any, the

plaintiff claims he is entitled to recover for its detention. If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least, the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a petition for attachment shall be the same as required for a motion for judgment under Rules of Court 1:4(d) and 3:16(b). The petition shall also set forth the existence of one or more of the grounds of attachment mentioned in §8.01-534, and shall ask for an attachment against the specific personal property mentioned in

the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of such defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some other person cognizant of the facts therein stated.

* * *

§8.01-540 (formerly §8-526). Issuance of attachment; against what attachment to issue. -- Upon the filing of the petition mentioned in §8.01-537, the clerk or the magistrate before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8.01-538. If the plaintiff seeks the recovery of specific personal property, the attachment may be against such property and against the principal defendant's

estate for so much as is sufficient to satisfy the probable damages for its detention; or, at the option of the plaintiff, against the principal defendant's estate for the value of such specific property and the damages for its detention. If the plaintiff seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

If the attachment be issued by a magistrate, it shall be returnable as prescribed by §8.01-541. The magistrate shall promptly return to the clerk's office of the court to which the attachment is returnable the petition and the bond, if any, filed before him. The proceedings thereafter shall be the same as

if the attachment had been issued by the clerk.

* * *

§8.01-546 (formerly §8-533). What attachment to command; summons. -- Every attachment sued out against specific personal property shall command the sheriff or other officer to whom it may be directed to attach the specific property claimed in the petition, and so much more of the real and personal property of the principal defendant as shall be necessary to cover the damages for the detention of the specific property sued for and the costs of the attachment. Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution

as will be sufficient to satisfy the plaintiff's demand, and, in case of tangible personal property, taken possession of under §8.01-551, to keep the same safely in his possession to satisfy any judgment that may be recovered by the plaintiff in such attachment.

Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for the attachment.

* * *

§8.01-551 (formerly §8-538). When bond given officer to take possession of property. -- If the plaintiff shall, at the time of suing out an attachment, or afterwards, give bond with surety, approved by the clerk issuing the attachment, in a

penalty of at least double the fair value of the property on which the attachment is levied, with condition to pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the attachment, the officer to whom the attachment is directed shall take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given, the fact shall be endorsed on the attachment, or certified by the clerk to the officer, who shall return the certificate with the attachment. But the officer levying the attachment shall, before taking possession of any property as aforesaid, make his certificate of the fair value of the property on which the attachment is levied, and he shall not

take possession of the same unless and until bond as aforesaid shall be given in a penalty of at least double the fair value of the property as so stated in his certificate. Such certificate shall be filed in the clerk's office of the court to which the attachment is returnable and the value so certified shall be subject to review by the court to which the attachment is returnable.

* * *

§8.01-552 (formerly §8-539). Bond required of plaintiff when defendant makes affidavit of substantial defense. -- If a principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that

fact, and the attachment shall stand, dismissed ipso facto unless within ten days from the service of such notice the plaintiff, or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment. But this section shall not apply in any case in which the plaintiff has, prior to the filing of such affidavit, given the bond designated in §8.01-551, or the defendant has given the bond designated in §8.01-553.

* * *

§8.01-568 (formerly §8-556). Quashing attachment or rendering judgment for defen-

dant. -- The court in which an attachment is pending, may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the plaintiff, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or that none of the grounds for attachment in §8.01-534 exist, or that the plaintiff is not likely to succeed on the merits of his underlying claim. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and damages for loss of the use of his property, and there shall be an order for

the restoration of the attached effects. The plaintiff shall have the burden of proof in proceedings pursuant to this section.

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Fourth Circuit, that on the facts alleged there was no joint participation or engagement by private litigants with state officials amounting to action under color of state law is a decision on a federal question which conflicts with the applicable decisions of this Court.

2. Whether the decision of the United States Court of Appeals for the Fourth Circuit, that on the facts alleged there was no joint engagement by private litigants with state officials amounting to action under color of state law conflicts with the decisions of other Courts of Appeal.

3. Whether the decision of the United States Court of Appeals for the Fourth Circuit that joint engagement or participation by private litigants, with state officials,

amounting to action under color of state law, requires official corruption or surrender of authority raises an important question of federal law which should be decided by this court.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is unreported and unpublished. It appears as Appendix A to the Petition for Certiorari at pp 32-41.

The opinion of the United States Court of Appeals for the Fourth Circuit is published but as yet unreported. It appears as Appendix B to the Petition for Certiorari at pp 42-129.

JURISDICTION

The Order of Judgment of the Court of Appeals was entered on January 9, 1981. (See Petition for Certiorari, Appendix B, p. 42.) The Petition for Certiorari was filed less than ninety (90) days from the aforesaid, as required by 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment XIV to the UNITED STATES CONSTITUTION provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Amendment V to the UNITED STATES CONSTITUTION provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1331 (a) provides in pertinent part:

> The district courts shall have jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States . . .;

(2) :

(3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

Va. Code Ann. §8-519 (Now §8.01-533)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 375) states in pertinent part:

> If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefore on any one or more of the grounds stated in the following section . . . .

Va. Code Ann. §8-520 (Now §8.01-534)(Code of Va. Vol 2, 1957 Repl. Vol. pp 376-377) provides in pertinent part:

> It shall be sufficient grounds for an attachment that the principal defendant or one of the principal defendants:
>
> :
>
> (4) Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay or defraud his creditors.
>
> (5) Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors.
>
> :

Va. Code. Ann. §8-524 (Now §8.01-537)(Code of Va. 1976 Cum. Supp.) Vol. 2, 1957 Repl. Vol. p. 38 provides in pertinent part:

> Every attachment, except an attachment for rent, shall be commenced by a petition

filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by §8-522.

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If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a motion for judgment under Rule of Court 3:18(d) shall be sufficient. The petition shall also set forth the

> existence of one or more of the grounds of attachment mentioned in §8-520, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of both defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some person cognizant of the facts stated therein.

Va. Code Ann. §8-526 (Now §8.01-540) (Code of Va., Vol 2, 1957 Repl. Vol. p. 382) States in pertinent part:

> Upon the filing of the petition mentioned in §8-524, the clerk or the justice of the peace before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8-524.1. . . . If the petitioner

> seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

Va. Code Ann. §8-527 (Now §8.01-541) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 382) states in pertinent part:

> Any attachment issued under this chapter may be directed to the sheriff, sergeant or constable of any county or city. Except when otherwise provided, it shall be returnable to a day of a term of the court not more than thirty days from its date of issurance nor less than 10 days from the date of service . . . .

Va. Code Ann. §8-533 (Now §8.01-546)(Code of Va., Vol. 2, 1957 Repl. Vol. p. 384), provides in pertinent part:

> . . . Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand . . . .
>
> Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for attachment, or state his grounds of defense thereto.

Va. Code Ann. §8-539 (Now §8.01-552)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 389) provides in pertinent part:

If the principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that fact, and the attachment shall stand dismissed ipso facto unless within ten days from the service of such notice the plaintiff or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment.

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Va. Code Ann. §8-540 (Now §8.01-553)(Code of Va. Vol. 2, 1957, Repl. Vol. p. 389) provides in pertinent part:

> Any property levied on or seized as aforesaid, under any attachment, may be retained by or returned to the defendant or other person in whose possession it was on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the principal defendant may, by giving bond with condition to perform the judgment of the court, release from any attachment the whole of any estate attached.

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Va. Code Ann. §8.01-114 provides in pertinent part.

> A. . . .
>
> B. The judge or magistrate aforesaid may issue such an order or other process ex parte upon the application of plaintiff, if there shall appear from his evidence, or that of his witnesses: (i) the kind, quantity and value of the property as to which plaintiff seeks possession, (ii)(a) that such property will be sold, removed, secreted or otherwise disposed of by the defendant, in violation of an obligation to plaintiff, so as to not be forthcoming to answer the final judgment of the Court respecting the same, or

(b) that such property will be destroyed or materially damaged or injured if permitted to remain longer in possession of such defendant or person claiming under him; and (iii) that plaintiff's claim of entitlement to recover said property as a substantial basis.

C. . . .

REVISERS' NOTE

This section, former §8-586, and others in this article were amended in 1974 to make the procedure comply with the requirements set out in Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). These two cases were further discussed in Mitchell v. W. T. Grant, 416 U.S. 600 (1974) in which the Supreme Court restricted the scope of the two former cases. In general, no substantive changes have been made to former §8-586 ff.

Va. Code Ann. §8.01-119 provides in pertinent part:

A. Within twenty one days after the issuance of any ex parte order or process pursuant to §8.01-113, or promptly upon application of either party, in either event after reasonable notice, the court in which such action or warrant is pending shall conduct a hearing to review the decision to issue the order or other process described in §8.01-114, ...

B. . . .

C. . . .

Va. Code Ann. §8-556. Quashing attachment of rendering judgment for defendant.

> The court in which an attachment is pending, or the judge of such court in vacation may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the attaching creditor, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or was issued on false suggestion, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and there shall be an order for the restoration of the attached effects.

STATEMENT OF THE CASE

There was no evidence taken in this case. The facts will be stated, taking the allegations of the Complaint as true.

On April 1, 1977, Giles Lugar, hereafter Lugar or debtor, was lessee operator of a truck stop located in Pittsylvania County, Commonwealth of Virginia (J.A. 41-43).

On March 31, 1977, Ronald Barbour, hereafter Barbour, executed a Petition for Attachment directed to the Clerk of the Circuit Court of Pittsylvania County. (J.A. 22, 26). This petition was filed under the provisions of Va. Code Ann. §8-519[1] on behalf of the defendant creditor

1. Title 8 of the Code of Virginia was revised, recodified and reenacted as Title 8.01 effective October 1, 1978. The Revisers notes indicated changes in some of the statutory language. The effect and substantive provisions of the statute remain substantially unchanged. However, all references will be to the statutory sections in effect at the time of the attachment.

Edmondson Oil Co. At the time Barbour was president of Edmondson (J.A. 26).

The petition alleged in part that a debt was due Edmondson and that Lugar was converting, assigning or disposing of his assets with intent to hinder or delay his creditors. (J.A. 22-26). No fraud or intent to defraud was alleged.

This petition was filed with the Clerk as required by Va. Code Ann. §8-524. The clerk as commanded by Va. Code Ann. §8-526 issued a writ of attachment directed to the Sheriff of Pittsylvania County, Virginia. (J.A. 27-30). The sheriff levied upon Lugar's assets as required by law, Va. Code Ann. §8-533, freezing the assets and closing his business (J. A. 35-37).

Lugar then filed an affidavit of substantial defense, Va. Code Ann. §8-539; in response to which the creditor posted the statutorily required bond.

The first hearing on the attachment

petition on April 19, 1977, and at the creditor's request, a rehearing was held on May 1, 1977. On May 4, 1977, a decision which found "no evidence sufficient to establish the grounds of attachment" was handed down and the levy was dissolved. (J.A. 38-40).

Prior to the levy, there was no hearing or intervention by a judicial officer, no notice to Lugar, no bond posted and no statement of more facts than conclusory allegations which recited the words of the statute. (J.A. 4-5, 9-10, 23-27).

After various proceedings in state court, Lugar filed this action in the United State District Court for the Western District of Virginia. The complaint alleged that a cause of action existed under 42 U.S.C. §1983. (J.A. 2, 6-7, 8, 16-17) Lugar alleged as facts supporting his complaint that Edmondson's and Barbour's acts were malicious; (J.A. 17), that Edmondson and Barbour were joint participants with the

state acting under color of state law; (J.A. 6, 16), that Edmondson and Barbour, acting with the state, had deprived him of his property without due process of law and that he had been injured thereby. (J.A. 6-7, 16-17). Lugar also alleged that the attachment entered without a hearing or judicial intervention (J.A. 4, 10) and by implication alleged that the clerk acted in a ministerial capacity (J.A. 2-3, 5, 8-9, 11).

The defendants filed a motion to dismiss alleging that the Court should abstain (J.A. 47). The District Court, acting sua sponte dismissed the complaint on the authority of Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). (Petition for Certiorari, Appendix A, pp. 32-41) The District Court found that there was no state action analyzing the attachment to the enforcement of a consensual lien.

Lugar sought to amend the judgment

and reinstate the action (J.A. 50-51). This motion was dismissed as untimely (J.A. 53-54). Lugar then appealed.

The case was heard by a three judge panel of the United States Court of Appeals for the Fourth Circuit in November, 1979. The Court of Appeals acting sua sponte set the matter for rehearing en banc on January 7,1980.

The Court of Appeals rendered its decision on January 9, 1981 (J.A. 55-56). It affirmed the District Court's judgment of dismissal but not on the grounds cited by the District Court. Instead, the Court of Appeals, after a lengthy analysis concluded that since there was no allegations or evidence of "usurpation or corruption of official power" or "surrender of power so that the independence of the enforcing official has been compromised to a significant degree and the official powers have become in practical effect shared by the

two," that no cause of action was stated. (Petition for Certiorari, Appendix B, at 103-104). The Court characterized the attachment process as submission by a litigant of "his interests along with those of his adversary to the neutral administration of the [state's] powers by state official having that responsibility." (Petition for Certiorari, Appendix B, at 106).

Lugar then filed his Petition for a Writ of Certiorari on April 6, 1981, and Certiorari was granted on June 15, 1981.

SUMMARY OF ARGUMENT

I

A

This Court has decided several cases involving prejudgment attachments and in all but one has granted relief. Two of the prior cases involved claims under 42 U.S.C. §1983 as does the case at bar. All cases involved private parties and some did not involve public officials as defendants.

No question has ever been raised that a prejudgment seizure does not involve sufficient state action to make a claim under 42 U.S.C. §1983. The Virginia statute fails to conform to the standards established by this Court. It's application involves joint action within the preview of 42 U.S.C. since the state does for the creditor what it cannot do itself. The decision of the Court of Appeals conflicts, as a result with this Court's decisions.

B

This Court has previously found that a statute of a type similar to the Virginia statute abdicates effective state control of its power and authority. This meets the standard established by the Court of Appeals. Its failure to recognize this and reverse the decision of the District Court conflicts with the decisions of this Court.

C

This Court has recognized state involvement with private individuals sufficient to amount to a cause of action under 42 U.S.C. §1983 where the state and private parties act together in joint enterprise, the individuals are carrying out state law or custom; or the state has placed its power and prestige behind the individual actions.

While corruption and conspiracy may amount to such joint involvement, it has never been held to be necessary.

II

Other Courts of Appeal have found a cause of action in cases seeking a remedy for prejudgment seizures. As noted in the dissent, this has been the case even where judgment was ultimately rendered for the creditor.

State involvement substantially less overt has been found to give rise to a cause of action in real estate foreclosures. The decision of the Court of Appeals for the Fourth Circuit conflicts with these decisions.

III

This court has allowed relief in cases of prejudgment seizures as have several Courts of Appeal.

The decision by the U. S. Court of Appeals for the Fourth Circuit would establish a threshold requirement that corruption or surrender of control be shown. This requirement is not limited to prejudgment

seizure cases and would severely limit access to federal courts. This is a point of law which should be passed on by this court.

ARGUMENT
I

The decision of the Court of Appeals conflicts with the applicable decisions of this Court in that it finds no cause of action in situations where this Court has recognized such a cause of action. It further ignores the finding of this Court that an abdication of state power exists under a similar statute.

The standard which the Court of Appeals sets out has no support in the applicable decisions of this Court.

A.

The United States Court of Appeals for the Fourth Circuit has found that, in order for there to be a cause of action under 42 U.S.C. §1983, there must exist, or be alleged, that the private defendant has usurped or corrupted state officials in the exercise of their power. Alternatively, the state or state officials must so surrender control of his power as to compromise his independence of action (Petition for Certiorari, Appendix

B, 103-104). Absent such a set of circumstances, the Court of Appeals characterizes the prejudgment attachment as merely "invok-[ing] the states judicial process...[and submitting] his interests along with those of his adversary to the neutral administration of state officials" (Petition for Certiorari, Appendix B, 106).

Having established this standard, the Court of Appeals found that neither corruption or surrender of power existed and dismissed the action for failing to state a claim under 42 U.S.C. §1983.

With due respect to the Court of Appeals, this is error and conflicts with the applicable decisions of this Court and other Courts of Appeal in several ways.

This Court in Fuentes v. Shevin, 407 U.S. 67(1972) and earlier in Lynch v. Household Finance Corp., 405 U.S. 538(1972) was presented with cases involving a claim under 42 U.S.C. §1983 against private parties as well as state

officials. There is no suggestion whatever, in either case, that for the private parties to be amenable to suit under 42 U.S.C. §1983, that corruption or surrender must be shown on the part of state officials.

Lynch, supra, in particular dealt with the court's jurisdiction under 28 U.S.C. §1343(3) which copies the language of a portion of 42 U.S.C. §1983. This Court specifically noted the involvement of the private parties, Lynch, supra at 539. It found jurisdiction and remanded for trial on the merits. The fact that state officials were parties in Lynch would not appear to be significant in considering the present case. The Court of Appeals found that state officials are not indispensible parties. (Petition for Certiorari, Appendix B, pp 88-89 and fn. 16, pp 84-85).

This Court again considered a case involving a challenged prejudgment seizure in Mitchell v. W. T. Grant, Co., 416 U.S. 600

(1974). The jurisdiction in that case would have been grounded on 28 U.S.C. §1257(3). Although the challenged statute was found to be valid, no mention or question was raised that a cause of action against a private party might not exist. No public officials were involved.

Again in North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) this Court considered a petition brought under 28 U.S.C. §1257(3). A Georgia statute allowing for prejudgment seizures was challenged. No public officials were involved. The seizure was characterized by the Georgia Supreme Court as amounting to a lis pendens.

This Court struck down the Georgia statute without once questioning that a private party could not challenge a deprivation of constitutional right by another private party in such circumstances.

In Mitchell, supra, and Di-Chem, supra,

the requirements for some sort of due process protection of a debtor were revised and refined. Mitchell, supra, struck down the Georgia statute since the order for the seizure was issued by a clerk "without notice and opportunity for an early hearing and without participation by a judicial officer, Di-Chem, supra, at 606.

The Georgia statutes attacked bear a strong resemblence to the Virginia statutes challenged.

The defendant-creditor would characterize the Virginia statute as providing an opportunity for an early hearing, Va. Code Ann. §8.01-568 formerly Va. Code Ann.§8-556, and fitting the Mitchell standards "like a glove." (Brief in Opposition to Petition for Certiorari, pp 11-12). This argument is erroneous in three respects.

First, it deliberately ignores the lack of judicial involvement so characteristic of Di-Chem, supra; Fuentes, supra; and related

cases.

Second, it does not take account of the provisions of Va. Code Ann. §8.01-541 formerly Va. Code Ann. §8-527 which establishes a return date for the petition to the clerk. The hearing in this case was held one day after the return date noted on the Writ (Appendix 33). It further fails to take account of the fact that Va. Code Ann. §8.01-568 only provides that a hearing may be held on motion. Comparison to the Virginia statutes on detinue is instructive. The Revisers note indicates that this statute was amended to meet the Mitchell standards. In addition to providing judicial supervision, Va. Code Ann. §8.01-114(B), it also provides that a prompt hearing shall be held on application of either party Va. Code Ann. §8.01-119(A).

The final failure of the creditors' argument is that it fails, as did the Court of Appeals, to take account of the relationship of the parties. In Sniadach v. Family

Finance Corp. 395 U.S. 337 (1969) this Court found it significant that the creditor had no prior interest in the debtors wages.

In Mitchell, supra, this Court found it noteworthy that the debtor did not have an exclusive and clear title to the property. 416 U.S. at 604.

In the present case it cannot be denied that the attaching creditor had no claim or right, legal or equitable, statutory or contractual in the debtors property, save only a security interest in accounts receivable. Had the creditor personally seized the property to preserve the "status quo" immediate criminal remedies for burglary and grand larceny would have been available to the debtor. It was only the intervention of state power and prestige, invoked by the creditor for its sole benefit, without question or control, which accomplished for the creditor what it could not otherwise do for itself. The creditor, effectively,

through the state, seized the debtors' property. The state does not act in such cases without the creditor requesting it to do so. It furthermore does not act to vindicate any compelling state interest in public health, safety, or welfare. While the state may have an interest in assisting creditors in collecting their debts, this interest does not override constitutional requirements applicable to all parties. To argue otherwise, in effect, prejudges the case by assuming that all debts are valid, all debtors are defaulters and all creditors always act in good faith.

This Court has refused to make that assumption. It has recognized causes of action and available remedies when a creditor and the state act together as they have here.

B.

The decision of the Court of Appeals

states as a borderline requirement for the existence of a course of action that there be corruption or surrender of power. It then finds that in the case at bar, no such circumstances exist.

Lugar alleged that the Attachment was issued by the Clerk without intervention by a judicial officer and the statutory sections involved (J.A. 3-5, 8-10). Taking these allegations as true as he is entitled to do, the Complaint alleges a ministerial act without judicial intervention.

Assuming that the requirements laid down by the Court of Appeals are valid, and this is not conceded, its decision is in direct conflict with the decisions of this Court. This Court, in Fuentes, supra, described a similar statute as an "[abdication] of effective state control over state power." 407 U.S. at 93. This description is supported by the analysis in Di-Chem, supra. This is sufficient to meet

the standards imposed by the Court of Appeals.

C.

The Court of Appeals out of several prior cases of this Court has woven a requirement of corruption or abdication of control. As previously discussed, this conflicts with the decisions of this Court in cases involving similar sets of circumstances. The analysis also is not supported by the cases cited and conflicts with them.

This Court has long held that individuals jointly engaged in a joint enterprise with state officials are liable under 42 U.S.C. §1983. Thus conspiracy or action to consummate an unlawful purpose is state action on the part of private parties. Sparks v. Dennis, ___ U.S.___ , 66 L.Ed 2d 185(1980); United States v. Price, 383 U.S. 787 (1966). Action by private individuals to enforce an unconstitutional state law is actionable Peterson v. City of

Greenville, 373 U.S. 244(1963). Likewise, action under an otherwise valid state law in enforcement of an unconstitutional state custom is state action. Adickes v. S. H. Kress & Company, 398 U.S. 144(1970). Notably, while these cases involve concerted actions by private and public parties, they make no suggestion that only corruption or abdication are sufficient to constitute a cause of action.

The common thread running throughout is that where private parties act jointly with the state, to achieve a result commanded by state law and determined thereby that action under color of state law exists. To this basic premise is added here that the action by state officials is solely at the behest of the creditor, without control, judicial or otherwise, for the creditors sole benefit and that it is not in furtherance of any compelling state interest Fuentes, supra at 90-92.

The circumstances require the analysis of Burton v. Wilmington Parking Authority, 365 U.S. 715(1961). That analysis is that the placing of state power and prestige behind a private party raises a cause of action. 365 U.S. at 725.

This is what has occurred here. The complaint is not that the creditor was on the winning side of a law suit. Seizure of property for the sole benefit of one party prior to a claim being adjudicated hardly qualifies as "neutral administration" or being on the winning side of a law suit. It is, however, the result of joint actions and the placing of state power and prestige at the behest of one party. Accordingly, a cause of action exists under the decisions of this court.

II

The decision of the Court of Appeals conflicts with the decisions of other Courts of Appeals involving similar circumstances and parties. No other Court of Appeals considering this issue appears to have adopted this reasoning.

The decision of the Court of Appeals for the Fourth Circuit conflicts with the decisions of other Courts of Appeals. These Courts have allowed relief on causes of action involving private plaintiffs where the wrong alleged involved prejudgment attachments or garnishments. Johnson v. American Credit Co. of Georgia, 581 F2d 526 (5th Cir. 1978), Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F2d 125 (8th Cir. 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973).

Additionally, as pointed out by Judge Butzner in his dissenting opinion, (Petition for Certiorari, pp 110-123), there is a

conflict with other Courts of Appeal which have found a cause of action even though judgment was ultimately rendered for the creditor. (See Petition for Certiorari, p. 122 for cases cited.)

There is also the case of Jonnett v. Dollar Savings Bank of the City of New York, 530 F2d 1123 (3rd Cir. 1976) wherein the Court found prejudgment attachment statutes unconstitutional. Although the jurisdictional basis was provided by diversity the Court implied that it would find a cause of action based on the federal question. Neither Johnson, supra; Guzman, supra; Western Coach Corp., supra; nor Jonnett, supra, even hint at a requirement of consipracy or abdication of power in order to establish a cause of action.

The holding below would also conflict with the analysis and finding of juris-

diction in Diffenbach v. Attorney General of Vermont 604 F.2d 187, 192-195 (2d Cir. 1979). Although that case involved a public defendant, the Court of Appeals for the Second Circuit found state involvement in the action of private parties. This was based on the involvement of the state judicial system in the foreclosure process of Vermont. The involvement there of the state is substantially less than in this case where the state acts extrajudicially to benefit one party to a dispute.

None of these cases and none of the cases cited in the dissent use or even suggest the analysis adopted by the Court of Appeals for the Fourth Circuit. All have followed this Court in finding that a remedy exists which presupposes a cause of action.

III

The decision of the Court of Appeals establishes a principle of federal law which would severely limit relief under 42 U.S.C. §1983 and access to federal courts.

This case, as decided by the Court of Appeals for the Fourth Circuit, raises an important issue of federal law which should be decided by this Court.

This Court has recognized a cause of action for prejudgment seizures in Lynch, supra; Sniadach, supra; Fuentes, supra; Mitchell, supra and Di-Chem, supra. Several of these cases have involved claims under 42 U.S.C. §1983. Other Courts of Appeal have recognized causes of action on similar circumstances; Johnson, supra; Guzman, supra; Western Coach Corp., supra; cf. Jonnett, supra.

The standard for determining whether or not a cause of action exists has been the involvement of the state with the private party. Thus, where the state has

placed its power and prestige behind the private party, as in Burton, supra, a cause of action exists. Where the state and private parties act jointly together, a cause of action exists; Dennis v. Sparks, supra; United States v. Price, supra. Likewise, there is joint action where the state commands a result and the parties act together to achieve it. Adickes v. Kress, 398 U.S. 144(1970).

While Sparks, supra, and Dennis, supra, involve joint acts in violation of law, Adickes, supra involves action by a private person under an otherwise valid state law for an improper purpose. Burton did not involve overtly joint action while Lynch, Sniadach, Fuentes and Di-Chem did.

The Court of Appeals, from such cases as Adickes, supra, and Sparks, supra, has derived a standard which it applies to prejudgment seizure cases. This standard of corruption or surrender of control would,

applied on its face, have required the dismissal on the pleadings of most, if not all of these cases or, at the very least of the private parties.

The new standard does not apply only to these cases. It is across the board and would effectively cripple the remedial aspects of 42 U.S.C. §1983 as applied to private parties. Unless corruption or abdication is alleged; and, presumably proven by the plaintiff, the private party is immune. It would appear that effectively the Court of Appeals has evoked a standard under which not only is access to federal courts severely limited but which effectively would imply that many prior cases of this court were wrongly entertained.

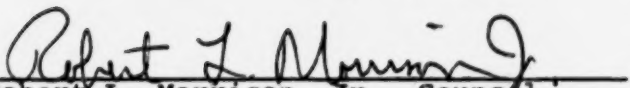
Such a limitation of court access and new principle of federal law should be ruled on by this Court.

CONCLUSION

The petitioner, Giles M. Lugar, for the reasons above stated, moves that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit. Lugar further moves that this Court disapprove the threshold requirements established by the lower Court and that this case be remanded to the United States District Court for the Western Districk of Virginia for trial on the merits.

Respectfully submitted,

Giles M. Lugar
By Counsel



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C E R T I F I C A T E
O F S E R V I C E

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I the undersigned do hereby certify that:

1. I am a member of the Bar of this Court, in good standing and represent the petitioner herein.

2. Pursuant to Rule 28.3, I have caused three copies of the Petitioner's Brief to be served upon Jackson Kiser, Young, Kiser, Haskins, Mann, Gregory, & Young, Ltd., 60 West Church Street, Martinsville, Virginia, 24112 and to H. Victor Millner, Main Street, Chatham, Virginia, 24531.

3. Pursuant to Rule 28.4, I have caused a copy of the Petition for a Writ of Certiorari to be served ypon the Attorney General of Virginia and, at his request, have caused three copies of the Petitioner's Brief on the Merits to be

served upon the Attorney General of Virginia and that no question has been certified by any Court of the United States to the Attorney General of Virginia on the question of constitutionality of the state statute, this 29th day of July, 1981.

Robert L. Morrison Jr.

AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 29th day of July, 1981 mailed the required copies of the Petitioner's Brief on the Merits and Joint Appendix to the Clerk's Office of the Supreme Court of the United States.

BY: Barbara E. Grove

Lawyers Printing Co.
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July 29, 1981

Sworn to before me this 29th day of July, 1981.

Cynthia Q. Gray
NOTARY PUBLIC FOR VIRGINIA

My Commission Expires: 8/10/84

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NO. 80-1730

IN THE

Supreme Court of the United States

October Term, 1981

GILES M. LUGAR,

Petitioner

v.

EDMONDSON OIL COMPANY, INC.
and
RONALD L. BARBOUR,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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Petition for Certiorari filed April 6, 1981
Certiorari Granted June 15, 1981

QUESTIONS PRESENTED

1. When the Petitioner did not challenge the constitutionality of the Virginia attachment statutes in either the District Court or the Court of Appeals, should he be permitted to challenge the constitutionality of the statutes for the first time in this Court?

2. If this Court should decide to review the constitutionality of the Virginia attachment statutes, do the statutes provide the debtor with a timely and sufficient hearing that satisfies the Due Process Clause of the Fourteenth Amendment?

3. Whether the Petitioner's Complaint and the arguments of his counsel demonstrate that the Petitioner was deprived of any property without due process of law within the meaning of the Fourteenth Amendment?

4. When the Petitioner failed to challenge the constitutionality of the Virginia attachment statutes and did not allege that any state official acted improperly in following the mandate of the law, but only alleges improper conduct by Respondents acting as private citizens, does the Petitioner state a valid claim for relief within contemplation of §1983?

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INTRODUCTION

Giles M. Lugar, Plaintiff in the trial court, will hereafter be referred to as "Petitioner". Edmondson Oil Company, Inc., and Ronald L. Barbour, Defendants in the trial court, will hereafter be referred to as "Respondents". All references to the Petition for Writ of Certiorari will be designated "P" with the appropriate page number. References to the trial court record will be designated "R" and assigned the appropriate index number assigned by the Clerk of the District Court. All references to the Joint Appendix will be designated "J.A." with the appropriate page number.

STATUTORY PROVISION INVOLVED WHICH IS NOT INCLUDED IN PETITION FOR WRIT OF CERTIORARI OR PETITIONER'S BRIEF ON THE MERITS

Virginia Code §8-538. When bond given officer to take possession of property. --

> If the plaintiff shall, at the time of suing out an attachment, or afterwards, give bond with surety, approved by the clerk issuing the attachment, in a penalty of at least double the fair value of the property on which the attachment is levied, with condition to pay all costs and damages which may be awarded against him or sustained by any person, by reason of his suing out the attachment, the officer to whom the attachment is directed shall take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given, the fact shall be endorsed on the attachment, or certified by the clerk to the officer, who shall return the certificate with the attachment. But the officer levying the attach-

ment shall, before taking possession of any property as aforesaid, make his certificate of the fair value of the property on which the attachment is levied, and he shall not take possession of the same unless and until bond as aforesaid shall be given in a penalty of at least double the fair value of the property as so stated in his certificate. Such certificate shall be filed in the clerk's office of the court to which the attachment is returnable and the value so certified shall be subject to review by the court to which the attachment is returnable.

SUMMARY OF ARGUMENT

1. The Petitioner failed to challenge the constitutionality of the Virginia attachment statutes in either the District Court or the Fourth Circuit Court of Appeals. In fact, he wrote a Memorandum to the District Court stating that "No question of the constitutional validity of the State statutes is made". (District Court Record, R. 5). During the arguments to the Court of Appeals, the Petitioner continued his refusal to raise any direct challenge to the constitutional validity of the Virginia attachment statutes. (P. 43). As a result of the Petitioner's continued refusal to raise this issue, the validity of the statutes was never considered by the District Court or the Court of Appeals. It is submitted that this Court should not permit the Petitioner to challenge the statutes for the first time in this Court.

2. Even if this Court should decide to consider the constitutionality of the Virginia attachment statutes, the statutes would satisfy all tests of fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. Virginia Code §8-556 (Petitioner's Brief, p. 14) provides the debtor with a timely and sufficient hearing before the court in which an attachment is pending simply by making a motion to the court for a hearing. The attachment will be quashed if the court finds that it was issued upon false suggestion or without sufficient cause. This evidentiary hearing before a judicial officer of the State is in accord with this Court's decisions in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

3. The Petitioner's Complaint and the arguments of his counsel demonstrate that the Petitioner has failed to show that he was deprived of any property right secured by the Constitution and the laws of the United States. As stated by the Court in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), a plaintiff must meet two requirements to show a valid cause of action under §1983:

> (1) The deprivation of a right secured by the Constitution and the laws of the United States; and
>
> (2) The deprivation of such a right by a person while acting under color of law.

When all of the Petitioner's allegations are accepted as true in the case at bar, the Petitioner has shown nothing more than the private misuse of a valid state statute by private citizens of the State

of Virginia. It is well settled by the decisions of this Court that the Due Process Clause of the Fourteenth Amendment offers no protection from deprivation of property by private individuals.

The remedies provided by the State of Virginia to a debtor from action by a malicious creditor are thoroughly adequate to protect citizens of the State. The attachment statute requires a bond, with security, and a penalty at least double the amount of the creditor's claim for the protection of a debtor who suffers monetary loss from an attachment improperly issued. The State also recognizes the tort remedy of abuse of process as additional protection for a defendant who has been damaged by a citizen who has abused legal process provided by the State.

4. In the case at bar, the Petitioner did not challenge the Virginia attachment statutes nor did he impugn the ministerial roles of the clerk of court and sheriff who properly followed the mandate of Virginia law (Petitioner's Brief, p. 16). The Petitioner alleged no improper use of State power or State law by officials of Virginia.

It is submitted that the heart of Petitioner's claim as set forth in the Complaint is that a private party should be able to challenge a deprivation of a Constitutional right by another private party (Petitioner's Brief, p. 28). Under the decisions of this Court, the conduct alleged in the initial Complaint does not state a claim upon which relief could be claimed within contemplation of §1983.

In the circumstances of the present case where one private party is

suing another private party and where all State statutes and actions of State officials are valid, there must be some allegation that the private defendant had some joint understanding or engagement, either express or implied, with a State official to improperly use the power of the State in order for the private defendant to be acting under color of law within the meaning of §1983.

ARGUMENT

I.

THE PETITIONER DID NOT CHALLENGE THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES IN THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTES IN THIS COURT.

The Complaint commencing the present civil action is set forth in three detailed counts with numerous factual allegations. (J.A. pp. 2-21). All of the factual allegations have been accepted as true by the Courts below and the Respondents. The Complaint does not challenge the Constitutional validity of the Virginia attachment statutes nor does it impugn the conduct of the court clerk and sheriff for the ministerial roles they played is issuing and levying the attachment. "Ordinarily, this Court does not decide

questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976).

As noted in the District Court's opinion (P. 38-40), the Petitioner did not question the constitutional validity of the Virginia attachment statutes. The District Court's statement is clearly supported by the Petitioner's Memorandum in Opposition to Respondents' Motion to Dismiss (District Court Record, R. 5). In this Memorandum, the Petitioner states:

> "The Defendants state... that the Plaintiff's claim for federal jurisdiction and his entire case is predicated upon the alleged absence of due process, by virtue of the application of State attachment statutes. This is incorrect. A reading of the Complaint...shows conclusively that the gravamen of this action is the alleged wrongful acts by the Defendant. No question of the constitutional validity of the State statutes is made." (Emphasis added).

Again, in the en banc oral argument before the Fourth Circuit Court of Appeals, the Petitioner reiterated his disaffirmance of a challenge to the Constitutional validity of the Virginia statutes. The Circuit Court took note of the Petitioner's position in its opinion when it stated:

> "...Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality, so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted, both in the district court and on appeal to this court." (P. 43).

Since the constitutionality of the Virginia statutes was not placed in issue in either the District Court or the Circuit Court and was not decided by either Court, Petitioner should not be permitted, for the first time, to challenge the statutes in this Court. Adickes v. S. H. Kress and Co., 398 U.S. 144, 147,

90 S.Ct. 1598, 1602-1603 (1970), footnote 2.

The decisions of this Court and decisions of various Circuit Courts of Appeal relied upon by the Petitioner in his Brief concern direct Constitutional challenges to state statutes. Petitioner cites in support of his position the decisions of this Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972), and Lynch v. Household Finance Corp., 405 U.S. 538 (1972). These decisions involved challenges to the replevin statutes of the States of Florida and Pennsylvania in Fuentes and to the garnishment statute of the State of Connecticut in Lynch.

The decisions of the Circuit Courts of Appeal relied upon by the Petitioner demonstrate that a Constitutional attack on a state statute was involved in each case: Johnson v. American Credit Co. of

Georgia, 581 F.2d 526 (5th Cir. 1978) (Prejudgment attachment statute of State of Georgia held to violate procedural due process of law in violation of Fourteenth Amendment); Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F.2d 125 (8th Cir. 1975) (North Dakota prejudgment attachment statute held unconstitutional as violation of Due Process Clause; Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973) (Arizona garnishment statutes held to violate Due Process Clause); Jonnet v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) (Pennsylvania's foreign attachment statutes held unconstitutional as lacking procedural due process).

In both this Court's decisions and the Courts' of Appeal decisions relied upon by Petitioner, there was a direct

constitutional attack on the statutes involved and a decision was rendered based on the Court's analysis of the particular statute. State involvement was undisputed and never an issue in any of these cases.

Conversely, neither the District Court nor the Fourth Circuit Court of Appeals addressed the question of the Constitutionality of the Virginia attachment statutes in the case at bar because Petitioner constantly maintained that the validity of the statutes was not an issue. If the statutes were not an issue, then they must be presumed to be Constitutional.

II.

THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES, BUT EVEN IF IT DOES UNDERTAKE A REVIEW OF THEM, THEY WOULD BE FOUND TO MEET THE TEST OF DUE PROCESS WHEN MEASURED BY THIS COURT'S PRIOR DECISIONS.

This Court's earlier decisions of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), must be read in light of its later decisions in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975). Mitchell and Di-Chem unquestionably modified the requirement of preseizure notice and hearing as enunciated in the earlier cases of Sniadach and Fuentes. Mitchell and Di-Chem require only that

an opportunity for a timely and sufficient hearing be provided.[1]

In the case at bar, the Respondents had a definite interest in seeing that the property subject to the attachment was not depleted. The principal action proceeded to a judgment on the debt in favor of the Respondents in the State Courts. Some of the Petitioner's property was then sold to partially satisfy the judgment. (P. 50).

The recent decisions of this Court have held that Due Process of Law under the Fourteenth Amendment is accorded to a party when he is afforded a timely and sufficient hearing. A hearing meeting the requirements of the Due Process Clause can occur after

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[1]An excellent analysis of the interrelationship of these decisions appears in Brabham, Sniadach through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U.Rich. L. Rev. 157 (1977), and Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807 (1975).

a questioned event as well as before the event.

> "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' Phillips v. Commissioner, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931)." Mitchell v. W. T. Grant Co., 416 U.S. at 611, 94 S.Ct. at 1902.

ACCORD, Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2649 (1979) (Summary suspension by New York State of harness racing license without presuspension hearing does not violate Due Process Clause if a sufficient timely post-suspension hearing is promptly provided); Mackey v. Montrym, 443 U.S. 1, 99 Sup.Ct. 2612 (1979) (Massachusetts statute mandating suspension of driver's license for failure to take breathalyzer test upon arrest for drunk driving did not violate Due Process Clause when a post-suspension hearing is available immediately at request of driver).

In Virginia after an attachment has been issued, the debtor has the right to a judicial hearing by simply making a request to the court in which the attachment is pending. The following statute, Virginia Code §8-556 was effective when the attachment was issued in the present case:

Va. Code Ann. §8-556. Quashing attachment of rendering judgment for defendant.

> The court in which an attachment is pending, or the judge of such court in vacation may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the attaching creditor, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or was issued on false suggestion, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and there

shall be an order for the restoration of the attached effects. (Petitioner's Brief, p. 14) (Emphasis added).

It is submitted that the State of Virginia has satisfied the Due Process Clause by providing for a timely post-attachment judicial hearing simply on motion of the defendant. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, at 607, 95 S.Ct. 719 at 723, this Court found the garnishment statutes of Georgia did not satisfy the Due Process Clause, in part, because there "... is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment". Mr. Justice Powell observed, in a concurring opinion: "The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing." North

Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 613, 95 S.Ct. at 725. The Virginia statute has no such deficiency and meets the standard of a timely and sufficient hearing required by the Due Process Clause.

Not only do the Virginia statutes meet the requirements of an early hearing and fiscal responsibility of the creditor, they go much further toward insuring the debtor Due Process of Law. A reading of the Virginia attachment statutes reveals a plan whereby, under circumstances which are basically limited to the loss or devaluation of security or property (Virginia Code §8-520, Petitioner's Brief, pp. 5-6) a claimant (Virginia Code §8-519, Petitioner's Brief, p. 5) may upon a sworn petition before the clerk of court cause that clerk to issue a writ of attachment if the petition contains verified

allegations that the debtor intends to engage in specified acts to the injury of his creditors (Virginia Code §8-524, Petitioner's Brief, pp. 6-8 and Virginia Code §8-526, Petitioner's Brief, pp. 8-9). The writ of attachment directs the sheriff to levy upon the property described in the writ (Virginia Code §8-533, Petitioner's Brief, pp. 9-10) but he is not empowered to seize the property unless the appropriate bond is posted (Virginia Code §8-538, Respondent's Brief, pp. 2-3). The levy will be voided by the mere act of the debtor filing a verified grounds of substantial defense, if the creditor thereafter fails to post the proper bond (Virginia Code §8-539, Petitioner's Brief, pp. 10-11). Moreover, the debtor is given the opportunity to go immediately before the appropriate judge to contest the attachment, and if the judge finds

that the grounds for the attachment do not exist or that it was issued on false suggestion, or without sufficient cause,[2] then the attachment will be quashed (Virginia Code §8-556, Petitioner's Brief, p. 14).

There is no substantial distinction between the attachment statutes of the State of Virginia and the sequestration statutes of the State of Louisiana which were approved by this Court in Mitchell with the exception of the issuing official being a clerk rather than a magistrate.[3]

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[2]See Carey v. Sugar, 425 U.S. 73, 96 S.Ct. 1208 (1976), where this Court apparently holds that had the issue of whether the creditor would be likely to succeed on the merits of his claim been a permissible one for decision in a hearing under the New York statute, the statute would have met the minimum requirements of due process.

[3]Justice Powell in his concurring opinion in Di-Chem did not require the issuing official to be a judicial official, but only a neutral party. See Footnote 3 to concurring opinion, 419 U.S. at 612, 95 S.Ct. 719.

Indeed, the Mitchell Court's description of an appropriate attachment procedure fits the Virginia statutes like a glove. There it was said:

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors without notice, hearing or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit.' The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed by personal notice and a right to take the case to court, is a familiar method... and is open to no objection." Mitchell v. W. T. Grant Co., 416 U.S. at 613, 94 S.Ct. at 1903.

III.

THE PETITIONER'S COMPLAINT FAILS TO SHOW THE DEPRIVATION OF ANY PROPERTY RIGHT SECURED AND PROTECTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

A. DEPRIVATION OF PROPERTY BY PRIVATE INDIVIDUAL NOT PROTECTED BY FOURTEENTH AMENDMENT.

The decision of the Fourth Circuit and the Petitioner's Brief only consider whether the Respondents were acting "under color of state law" in determining if the Complaint filed by the Petitioner in the District Court stated a cause of action under 42 U.S.C. §1983. However, an equal, if not more serious, defect in the Petitioner's Complaint is that it fails to show that the Petitioner was deprived of a right "secured by the Constitution and the laws" of the United States.

In Flagg Bros., Inc. v. Brooks, 436 U.S. at 156, 98 S.Ct. at 1733, this Court stated the following two requirements of a viable cause of action under §1983:

> "A claim upon which relief may be granted to respondents ...under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that Flagg Brothers deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry."

As previously discussed in Argument I, the Petitioner did not challenge the Constitutionality of the Virginia statutes in the courts below, nor did he question the ministerial acts of the court clerk and sheriff. Therefore, the statutes and conduct of the state officials are presumtively valid.

The Petitioner refers to no other right secured by the Constitution than the Due Process Clause of the Fourteenth Amendment. The Respondents agree that the Petitioner may have been deprived of property rights and that state officials performed ministerial acts by issuing the attachment. However, the Fourteenth Amendment does not protect against all deprivations of property. "The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 1913, 49 U.S.L.W. 4509, 4511 (May 18, 1981). Likewise, the Amendment offers no protection from deprivation of property by private individuals. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S.Ct. 449, 453 (1974), this Court reaffirmed "...the essential dichotomy set forth in that Amendment between

deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

When all of the Petitioner's allegations of fact are accepted as true, the record of this case demonstrates that the Petitioner has shown nothing more than the private misuse of a valid state statute by a citizen. The fact that Virginia enacted various attachment statutes does not make the actions of private individuals attributable to the State. Under the decisions of this Court, the Virginia statutes are Constitutional. Mitchell v. W. T. Grant Co., supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., supra. Even though the Petitioner may have been deprived of property, the State and her ministerial agents have

accorded "due process of law" to the Petitioner within the meaning and protective shield of the Fourteenth Amendment.

B. REMEDIES PROVIDED BY STATE LAW TO REDRESS WRONGFUL DEPRIVATION OF PROPERTY SATISFIES PROCEDURAL DUE PROCESS MANDATED BY FOURTEENTH AMENDMENT.

In an attempt to insure that no citizen is deprived of property without "due process of law," the Virginia attachment statutes provide for a hearing to quash the attachment at any time after it has been returned simply on motion of the defendant. (Virginia Code Annotated, 1950, §8-556, Petitioner's Brief, p. 14). In addition to a hearing to determine if an attachment should be quashed, the tort remedies of Virginia also provide a means of redress for citizens who have suffered

property deprivations by malicious creditors. Initially, the attachment statutes require a bond, with security, in a penalty at least double the amount of the creditor's claim as protection for a debtor who suffers monetary loss by reason of suing out an attachment. (Virginia Code Annotated, 1950, §8-539, Petitioner's Brief, pp. 10-11). In the present case, the required bond was posted by the Respondents.

The State of Virginia also recognizes the tort remedy of abuse of process. In Glidewell v. Murray-Lacy and Co., 124 Va. 563, at 571 (1919), the Supreme Court of Virginia stated: "...if process is wilfully used for a purpose not justified by the law, it is an abuse for which an action will lie." Accord, 14B Michie's Jurisprudence of Virginia and West Virginia, "Process", section 61, "Abuse of Process", pp. 422-424 (1978). The

Petitioner's Complaint alleges a typical state cause of action for abuse of process: paragraph 20 of Count II alleges that the Respondents acted "contrary to Virginia law" in causing the attachment to issue (J.A., p. 13); paragraph 34 of Count II alleges that Petitioner suffered damages because of the "malicious, wanton, wilful and unlawful acts" of the Respondents in regard to the attachment (J.A., p. 17); in paragraphs 4, 5 and 6 of Count III, the Petitioner continues to allege malicious intent and unlawful conduct by the Respondents in regard to the attachment (J.A.,pp. 19-20).

Under the facts of the present case, the remedies afforded the Petitioner by the State of Virginia to redress property deprivations suffered at the hands of a malicious creditor satisfies the requirements of procedural due process mandated

by the Fourteenth Amendment. Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 49 U.S.L.W. 4509 (May 18, 1981).

IV.

A PRIVATE LITIGANT ACTING PURSUANT TO A VALID STATE STATUTE, DOES NOT ACT UNDER "COLOR OF LAW" WITHIN THE MEANING OF §1983 UNLESS THERE IS A JOINT UNDERSTANDING AND ENGAGEMENT BETWEEN THE PRIVATE LITIGANT AND A STATE OFFICIAL TO IMPROPERLY USE THE POWER OF THE STATE.

When all of the allegations in the Petitioner's Complaint and all arguments by counsel for Petitioner are accepted as true, the District Court and the Court of Appeals were presented with the following situation:

(1) The State of Virginia attachment statutes were not attacked as being unconstitutional. In fact, the Petitioner refused to raise the issue in a clear direct manner;

(2) The Petitioner did not claim an unconstitutional application of the Virginia statutes in the State attachment proceeding;

(3) No State custom or policy relating to the attachment statutes was claimed to be unconstitutional;

(4) The Petitioner did not allege that any State official of Virginia acted improperly or not in good faith in performing the ministerial function of his position in an attachment proceeding pursuant to the statutes. In fact, the Petitioner states that the State officials acted only in accordance with the law. (Petitioner's Brief, p. 16).

Against the aforesaid background presented by the Petitioner, the Fourth Circuit correctly formulated the issue for decision: whether the mere institution by a private litigant (Respondents) of presumptively valid state judicial proceedings, without any allegation of joint collusive acts at any time by the private litigant and state officials who in good

faith then perform their respective ministerial functions in the attachment proceeding, constitutes action under color of state law within contemplation of §1983? See P. 53-54. The Court of Appeals held that a complaint alleging only this conduct fails to allege that the Respondents acted under color of state law and the action was dismissed for failure to state a claim cognizable under §1983. See P. 106.

The majority opinion of the Fourth Circuit in reaching its decision in this case is correct. It properly applies the principles of Dennis v. Sparks, ____ U.S. _____, 101 Sup.Ct. 183, 49 USLW 4001 (Nov. 17, 1980), and Flagg Brothers v. Brooks, 436 U.S. 149 (1978). Further, in reviewing the decisions of this Court, the Circuit Court properly pointed to the decisions where a public official was

improperly using his authority in conjunction with the private litigant to deprive a complainant of a constitutionally protected right. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

Neither the Petitioner nor the dissenting judges in the Circuit Court have cited a case in which a state official acting in good faith in conjunction with a private litigant pursuant to a Constitutionally valid statute, regardless of the purposes or motivation of the private litigant, has been able to furnish the necessary "color of law" requirement to sustain an action under 42 U.S.C. 1983.

The dissenting opinion of the Circuit judges relies primarily on Fuentes in support of its rationale. Such reliance is misplaced because, as pointed out above, the act of the private litigant in Fuentes was taken in conjunction with a public

official pursuant to an unconstitutional statute. Nowhere in the Fuentes opinion is it ever intimated that the action of the official issuing the writ of replevin or of the private litigant requesting it would have deprived the plaintiff of due process, but for the fact the action was taken pursuant to the unconstitutional statute.

In the case at bar, the Court of Appeals acknowledged that there was state action through its involvement of the clerk of court and sheriff in the Virginia attachment proceedings. However, this acknowledgment does not answer the question of whether the specific action charged to the Respondents was the type of state action to be considered as taken under color of state law within contemplation of a §1983 action. See P. 92-95. In any Federal action based upon §1983, the

ultimate concern is "... the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack." (Opinion of Court of Appeals, P. 72).

This Court recognized in Adickes v. S. H. Kress and Co., 398 U.S. 144 at p. 152, 90 S.Ct. 1598 at pp. 1605-1606, that even though a §1983 action

> "...is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under §1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store...." (Emphasis added).
>
> * * *
>
> "The involvement of a state official in such a conspiracy plainly provides the state action essential to show

> a direct violation of petitioner's Fourteenth Amendment rights...." (Emphasis added).
>
> * * *
>
> "Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under §1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.'" (Emphasis added).

In the case at bar, Petitioner's claim as presented in the District Court and Court of Appeals was nothing more than allegations suggesting that a private party could challenge a deprivation of a Constitutional right by another private party even though the State law was valid and all conduct by State officials was

proper under the law. Although Petitioner is now attempting to raise a challenge to the Virginia statutes for the first time in this Court, his basic claim as commenced in the District Court is still the same. (Petitioner's Brief, p. 28).

The opinion of the Court of Appeals must be considered in relation to the factual case presented for decision by the Petitioner. It is obvious from the record and arguments presented to the Fourth Circuit that no improper use of State power or improper conduct by State officials was present to supply the necessary state action or action under color of law by Respondents to sustain a §1983 action. The private conduct of the Respondents was independent of, not joint with, the official conduct of the State in the attachment proceedings. The Petitioner's §1983 claim was properly dismissed because

the Complaint failed to show that the Respondents acted under color of law. (P. 106). Action under color of law within the contemplation of §1983 is not provided by

> "... merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process." (P. 104).

Under the facts of the present case as alleged by Petitioner, the Court of Appeals held that there must be a usurpation or corruption of official power by a private actor so that the independence of the official has been compromised. (P. 102-104). The literal wording of this test for a §1983 complaint may be too restrictive.

It is submitted that a more proper test under the facts of the present case would be for this Court to adopt the reasoning of Justice Powell in his concurring opinion in Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 1919-1920 (1981):

> "The intent question cannot be given 'a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action,' Baker v. McCollan, 443 U.S. 137, 139-140, 99 S.Ct. 2689, 2692-2693, 61 L.Ed.2d 433 (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted in determining whether intent is a necessary element of such a violation."
>
> "In the due process area, the question is whether intent is required before there can be a 'deprivation' of life, liberty or property."
>
> * * *
>
> "A 'deprivation' connotes an intentional act denying

> something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations. This is the view adopted by an overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States. In addition, such a rule would avoid trivializing the right of action provided in §1983. That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power...." (Emphasis added).

Under the reasoning of Justice Powell, as well as the decision of the Fourth Circuit, the Petitioner fails to allege that the Respondents acted under color of law as contemplated by a §1983 action.

CONCLUSION

For the foregoing reasons stated in the Arguments in this Brief, the Respondents respectfully move the Court that the decision of the United States Court of Appeals for the Fourth Circuit be affirmed. The Petitioner's Complaint and the subsequent arguments of his counsel to the District Court and the Court of Appeals clearly demonstrate that he has not stated a claim which is cognizable under 42 U.S.C. §1983.

Respectfully submitted,

EDMONDSON OIL COMPANY, INC.
and
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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I, the undersigned, do hereby certify that:

1. I am a member of the Bar of this Court, in good standing and represent the Respondents herein.

2. Pursuant to Rule 28.3, I have caused three copies of the Respondents' Brief to be served upon Robert L. Morrison, Jr., of Warren, Parker, Williams and Stillwell, 317 Patton Street, Suite B, Danville, Virginia, 24541.

3. Pursuant to Rule 28.4(c), I have caused three copies of the Respondents' Brief to be served upon the Attorney General of Virginia and that no question has been certified by any Court of the United States to the Attorney General of

Virginia on the question of constitutionality of the state statute, this 21st day of September, 1981.

James W. Haskins
James W. Haskins

AFFIDAVIT OF SERVICE

In accordance with the Rules of the Supreme Court of the United States, I hereby certify that I am a member of the Bar of this Court and that on the 21st day of September, 1981, the required copies of the Respondents' Brief on the Merits were mailed to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, Washington, D.C., 20543.

James W. Haskins
James W. Haskins

Subscribed and sworn to before me this 21st day of September, 1981.

My commission expires December 28, 1981.

Virginia E. Roberts
Notary Public